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FILED

No. 96-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LINDA AUSTIN,

Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did this Court's decision in *Gilmer v. Interstate-Johnson Corp.*, 500 U.S. 20 (1991), holding that an agreement by an individual security industry employee for the arbitration of claims based on a statutory anti-discrimination right is enforceable, overrule or limit the line of cases beginning with *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1975), holding that an individual employee is entitled to pursue his own judicial cause of action to vindicate a statutory anti-discrimination (or other individual employee protection) right even if an applicable collective bargaining agreement grievance/arbitration procedure is also available to the employee?

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PETITION FOR WRIT OF CERTIORARI

Linda Austin—the plaintiff in this case in the trial court and the appellant in the court of appeals—respectfully petitions this Court to issue a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fourth Circuit in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

OPINIONS BELOW

The Fourth Circuit's decision and judgment as to which review is sought is reported at 78 F.3d 875, and is reprinted in the Appendix to this Petition (Pet. App.) as Appendix A, Pet. App. 1a. The underlying District Court opinion is reported at 844 F. Supp. 1103 (W.D. Va. 1994) and is reprinted as Appendix B to this Petition, Pet. App. 26a.

JURISDICTION

The opinion of the Court of Appeals panel was issued on March 12, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 30, 1996. Pet. App. 35a. On July 18, 1996, Chief Justice Rehnquist extended the time for filing this Petition for Writ of Certiorari to and including August 28, 1996. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, provides in relevant part:

> §2000e-5(f) *Civil action by . . . person aggrieved:* . . . (3) Each United States district court . . . shall have jurisdiction of actions brought under this subchapter.

The Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081, provides:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts amended by this Title.

The Americans with Disabilities Act, 42 U.S.C. § 12101 *et. seq.*, provides in relevant part:

§ 12117(a): The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies and procedures this subchapter provides . . . to any person alleging discrimination on the basis of disability in violation of any provision of this chapter . . . concerning employment.

§ 12212: Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter.

STATEMENT OF THE CASE

1. Facts

Linda Austin was employed by Owens-Brockway Glass for fourteen years. In June 1992, while working as an equipment cleaner/oiler-greaser, Austin sustained a work-related injury. Austin's physician released her for light duty work in August 1992, but Owens-Brockway informed her that no light duty work was available. Instead, Owens-Brockway placed Austin on "Inactive-Occupational Medical Leave" status, and she began receiving workers' compensation benefits. Subsequently, Austin was diagnosed with reflex sympathetic distrophy, a condition which makes walking, sitting and standing for prolonged periods of time difficult.

While she was receiving workers' compensation, Austin's job classification was eliminated. Although the only other person in that job classification, a male, was offered alternative employment, Austin was not. Finally, in June, 1993, Owens-Brockway informed Austin that her employment had been permanently terminated.

The Owens-Brockway unit where Austin worked is covered by a collective bargaining agreement entered into by the Employer and the Glass, Molders, Pottery, Plastic and Allied Workers International Union. That agreement pro-

vides for the filing of grievances by employees, and at the behest of the Union, for the processing of internal appeals from an initial decision rejecting a grievance. The agreement provides further that with regard to "all disputes not settled pursuant to [those procedures]" the "company or the union", but *not* any individual employee, has the right to take the matter to arbitration. Additionally, the 1993-96 collective bargaining agreement provides:

> Article 38
>
> Fair Employment and Equal Opportunities
>
> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2. This Contract shall be administered in accordance with the applicable provisions of the American with Disabilities Act. Before taking action relative to this Action, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.
>
> 3. Any dispute under this Article as with all other Articles of this Contract shall be subject to the grievance procedure.[1]

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[1] There was a dispute in the District Court concerning whether Austin was terminated before or after the 1993 collective bargaining agreement went into effect. Pet. App. 33a. The District Court concluded that Austin was terminated on June 1, 1993, when the quoted language was in effect, and the Court of Appeals proceeded on that premise as well. Pet. App. 33a, 2a, 7a.

The only difference in Article 38 between the agreement in effect as of June, 1993 and the one in effect before that is the addition of Paragraph (2) of that Article. Paragraph (1) of *both* the earlier and the later agreements provided for compliance with laws preventing discrimination based on both "sex" and "handicap" status. Consequently, the factual question concerning when the termination occurred is of no moment with respect to the issue decided by the Fourth Circuit and presented for review by this petition.

2. Proceedings Below

Austin commenced this action on July 13, 1993, alleging that the failure to assign her light duty after her injury violated the American with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and that the failure to transfer her when her job was eliminated while transferring her male counterpart was discrimination based on sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.* Owens-Brockway moved to dismiss, contending, *inter alia*, that Austin could not litigate her ADA and Title VII causes of action in court, but instead was limited to filing a grievance under the collective bargaining agreement.

The District Court—treating the employer's motion as one for summary judgment because material outside the pleadings was submitted by both sides—granted judgment dismissing Austin's case, holding that "[b]ecause plaintiff's complaint was subject to mandatory arbitration, the *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) line of cases applies here." Pet. App. 33a.[2]

On appeal, the Fourth Circuit panel, 2-1, also relied on *Gilmer* and a series of post-*Gilmer* cases enforcing *individual* agreements to arbitrate employment disputes in cases filed under Title VII and other employment discrimination statutes. The court of appeals read those cases as mandating that employees covered by collective bargaining agreements that include a grievance/arbitration procedure for resolving employment discrimination claims must use that procedure to resolve ADA and Title VII causes of action and can not file suit in federal court. Pet. App. 8a-18a.

While this case, unlike the cases the Fourth Circuit cited, involves a collective bargaining agreement grievance/

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[2] While Owens-Brockway also sought dismissal on the ground that Austin had not filed a charge with the EEOC, the District Court found that "[t]here is a significant dispute as to precisely what action Plaintiff took in bringing her complaint to the attention of the EEOC," and declined to grant summary judgment on that basis. Pet. App. 30a-31a.

arbitration provision entered into by the employer and by the union as an exclusive bargaining representative, the Court of Appeals inexplicably maintained that "[i]n all of the cases, including the *case at hand, the employee* attempting to sue had made an agreement to arbitrate employment disputes." Pet. App. 19a, emphasis supplied. And, the Court of Appeals "saw no reason to distinguish between a union bargaining away the right to strike and union waivers of individual employees' right to the full procedural rights accorded by employment discrimination laws." Pet. App. 19a. In coming to this conclusion, the Fourth Circuit mentioned this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), only in passing and only to brush it aside. Pet. App. 8a, 13a n.2.[3]

In dissent, Judge Hall criticized the majority for relying on *Gilmer* and its progeny, each of which differed from this case in that each involved an individual employee agreement while this case involves a collective bargaining agreement:

> The majority fails to recognize . . . that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim. [Pet. App. 22a]

Judge Hall emphasized (1) that "under *Gardner-Denver*, a clause in which a union purported to waive employees'

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[3] The Fourth Circuit relied on *Gilmer* even though that case was premised upon this Court's recent line of cases broadly construing the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* as generally applicable to statutory causes of action, while, under Fourth Circuit law, the FAA is *not* applicable to disputes arising out of collective bargaining agreements. Pet. App. 6a, *citing Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993). The Court of Appeals in this case therefore relied not on the FAA but on this Court's *Steelworkers Trilogy* "establish-[ing] that arbitration is favored in labor disputes." Pet. App. 6a, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 564 (1960); and *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 5th (1960).

rights to pursue Title VII claims in court would be clearly unenforceable," (Pet. App. 23a); and (2) that far from overruling *Gardner-Denver*, *Gilmer* expressly reaffirmed *Gardner-Denver* and the distinction between individual agreements to arbitrate statutory causes of action and collective bargaining agreement grievance-arbitration provisions covering employment discrimination claims. Pet. App. 24a. Judge Hall noted too that "the majority's holding will create a split among the circuits" on the question whether *Gilmer sub silentio* overruled *Gardner-Denver*. Pet. App. 25a.

A timely petition for rehearing and suggestion for rehearing *en banc* was denied by a vote of 9-4. The Equal Employment Opportunity Commission filed a brief *amicus curiae* in support of rehearing reiterating the EEOC's position, also stated in its brief *amicus curiae* at the merits stage of this case, that *Gilmer* in no way undermines *Gardner-Denver*.

REASONS FOR GRANTING THE WRIT

This Court held in *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1974) that a collectively bargained agreement providing for the arbitration of employment discrimination claims does not supplant the statutory right of the covered employees to bring their own federal statutory employment discrimination claims in federal court for determination by a judge and, where provided for, a jury. The Fourth Circuit in this case held to the contrary, on the theory that this Court's decision in *Gilmer v. Interstate Johnson/Johnson Lane Corp.*, 500 U.S. 20 (1991), enforcing an *individual*'s own agreement to arbitrate employment discrimination claims, *not Gardner-Denver*, states the rule governing this case.

The decision below is wrong in three different respects. First, the decision is contrary to *Gardner-Denver* and to an unbroken line of this Court's decisions following, elaborating on and expanding the scope of the *Gardner-Denver* principle. Second, the Fourth Circuit's refusal to apply *Gardner-Denver* is not, as the Court of Appeals

supposed, justified by this Court's decision in the analytically distinct situation presented in *Gilmer*. And, third the Court of Appeals' reliance on *Gilmer* is misplaced, since the *Gilmer* Court distinguished *Gardner-Denver* and did so in a manner that vouches for *Gardner-Denver*'s continuing vitality in its own sphere of application.

It goes without saying that a court of appeals commits error by issuing a ruling contrary to this Court's ruling in point as well as by slighting a ruling of this Court in point in order to follow one that speaks to a quite separate issue. But while less of a commonplace, it is no less true that a court of appeals errs by treating a decision of this Court as having been overruled by a second decision that carefully distinguishes the first. Even where there is a tension between the earlier decision and the later one—something that, we submit, is not, in fact, true here—the lower court's obligation is to apply the full corpus of this Court's jurisprudence and most certainly not to undertake to overrule a precedent in this Court. *See Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 534, 535 (1983) (even where a court of appeals " 'doubt[s] that [a Supreme Court decision] is still good law' " the lower court must follow that decision since "only this Court may overrule one of its precedents.")

Not surprisingly, then, the Fourth Circuit's decision here is in conflict with the decisions of the Second, Seventh and Tenth Circuits—the three other courts of appeals that have confronted the isue in this case since *Gilmer*—as well as decisions of the Maine Supreme Court and the Kentucky Court of Appeal.

The question presented here has profound implications for the civil justice system and for the collective bargaining system. The Fourth Circuit's usurpation of this Court's authority in deciding that question and its creation of a split with the other courts of appeals and state high courts call for the granting of *certiorari* in this case.

1. In *Gardner-Denver*, this Court ruled that an individual employee who had brought a grievance under a collec-

tive bargaining agreement grievance-arbitration procedure alleging race discrimination and whose union had taken that claim to arbitration and lost is not precluded from suing his employer under a federal employment discrimination statute, Title VII. In a line of cases stretching from *Gardner-Denver* through *Livadas v. Bradshaw*, 114 S. Ct. 2068, 2080 n.21 (1994), the Court has followed *Gardner-Denver*, extended it to cover all individual employee protective statutes, and elaborated on its essential rationale. *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) (applying *Gardner-Denver* to causes of action under the Fair Labor Standards Act and elaborating on its rationale); *McDonald v. City of West Branch*, 466 U.S. 284 (1984) (applying *Gardner-Denver* and *Barrentine* to causes of action under 42 U.S.C. § 1983); *Allis-Chalmers v. Lueck*, 471 U.S. 202, 213 n.8 (1985) (*Gardner-Denver* distinguished NLRA rights, conferred on employees collectively, "which could be waived by contract between the parties" from "an individual's substantive right derived from an independent body of law that could not be avoided by a contractual agreement."); *Atchison, Topeka, & Sante Fe Ry. Co. v. Buell*, 480 U.S. 557, 565 (1987), *citing McDonald*, *Barrentine*, and *Gardner-Denver* ("This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. . . . [T]he theory running through these cases is that notwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.'); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36 (1991) (reaffirming *Gardner-Denver*); *Livadas*, *supra*, 114 S. Ct. at 2080 (recognizing that *Gilmer* and *Gardner-Denver* are "basically consisten[t]".)

Each of the justifications the Fourth Circuit put forward for disregarding the *Gardner-Denver* principle is

belied by this Court's rulings in the *Gardner-Denver* line of cases and by their underlying rationale.

First, the Fourth Circuit maintained that Austin "is a party to a voluntary agreement to submit statutory claims to arbitration" because "[t]he collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration" and "[t]here is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate." Pet. App. 19a. In other words, the Court of Appeals maintained that the collective bargaining agreement constitutes a valid, enforceable prospective waiver of Austin's right to litigate her case in court, even though Austin herself is *not* a party to the agreement.

The employer in *Gardner-Denver* raised a plethora of arguments in support of its position that the employee in that case should not be able to proceed with a Title VII case in court, each of which was addressed by the Court. Prominent among those arguments was the very prospective waiver theory embraced by the Fourth Circuit here. And, that theory was clearly and decisively *rejected* by the Court:

> We think it clear that there can be no prospective waiver [through a collective bargaining agreement] of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights relating to collective activity, such as the right to strike. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956); *Boys Markets, Inc. v. Retail Clerk's Union*, 398 U.S. 235 (1970). These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised by the union as collective bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes but an individual's right to equal employment opportunities. . . . Of necessity, the rights conferred can be no part of

> the collective bargaining process. . . . [415 U.S. at 51.]

Second, the Fourth Circuit relied upon the " 'well-recognized policy of federal labor law favoring arbitration of labor disputes.' " Pet. App. 6a, *citing the Steelworkers Trilogy, supra*. But in *Barrentine v. Arkansas-Best Freight System, supra*, the Court, elaborating on *Gardner-Denver*, explained why there is a basic difference *in principle* between the mandatory arbitration under collectively-bargained grievance/arbitration provisions of contractually-established rights and the mandatory arbitration under such provisions of individual employee statutory rights, and why federal labor policy favors the former but not the latter:

> Two aspects of national labor policy are in tension in this case. The first, reflected in statutes governing relationships between employers and unions, encourages the negotiation of terms and conditions of employment through the collective bargaining process. The second, reflected in statutes governing relationships between employers and their individual employees, guarantees covered employees specific substantive rights. A tension arises between these policies when the parties to a collective bargaining agreement make an employee's entitlement to substantive statutory rights subject to contractual dispute-resolution procedures. [450 U.S. at 735].

The Court resolved this tension by relying on *Gardner-Denver*, explaining the "consideration [that were] the basis for our decision in *Alexander v. Gardner-Denver Co.*" as follows:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective bargaining agreement, different considerations apply *where the employee's*

> *claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.* [450 U.S. at 737 (emphasis supplied).][4]

And, the Court explained in some detail one reason *why* the federal labor law policy favoring arbitration under collectively-bargained procedures does not apply to disputes arising under statutes designed to protect individual employees:

> [E]ven if the employee's claim were meritorious, his union might without breaching its duty of fair representation reasonably and in good faith decide not to support the claim vigorously in arbitration. . . .

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[4] Based on these "different considerations", *Barrentine* made clear that employees are *neither* required to submit FLSA claims to a collectively-bargained grievance-arbitration procedure in the first instance nor precluded from proceeding in a court action under the FLSA if they have used the contractual procedure for either contractual or statutory claims. *See* 450 U.S. at 731 n.6 (holding of the case is equally applicable to those plaintiffs who filed grievances and those who did not.); *see also Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Gibson v. Local 40, Supercargoes & Checkers*, 543 F.2d 1259, 1266 n.14 (9th Cir. 1976); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974) (all holding that *Gardner-Denver* precludes any requirement of exhaustion of collective bargaining agreement grievance/arbitration procedures prior to filing a statutory employment discrimination suit).

Barrentine also made it clear that the consideration underlying the *Gardner-Denver* line of cases govern when the collective bargaining agreement *would* permit submission of the statutory cause of action *as such* to the arbitrator as well as when it only provides for submission of a contractual claim cognate to a statutory cause of action. The agreement in *Barrentine* provided for submission to arbitration of "any controversy which might arise." The Court recognized that under this language, "the grievance [could have] presented a claim under the FLSA in addition to the claim under the collective bargaining agreement" but nonetheless "h[e]ld that petitioners would not be precluded from bringing their action in federal court." 450 U.S. at 731 n.5.

> [Disputes that are subject to arbitration under a collective bargaining agreement are invariably processed by unions rather than by individual employees. Since a union's objective is to maximize overall [interests] of its members, not to ensure that each employee receives the best . . . deal available . . ., a union balancing individual and collective interests might validly permit some employees statutorily granted . . . benefits to be sacrificed if an alternative expenditure of resources would result in increased benefits for workers in the bargaining unit as a whole." [450 U.S. at 743, *citing Humphrey v. Moore*, 375 U.S. 335, 349 (1964) and *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-39 (1954).]

See also McDonald, supra, 466 U.S. at 291 ("The union's interests and those of the individual employee are not always identical or even compatible. As a result, the union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee."); *Gardner-Denver*, 415 U.S. at 58 n.19 ("A further concern is the union's exclusive control over the manner and extent to which an individual grievance is present. . . . In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining process.")

Third, the Fourth Circuit maintained that whatever force *Gardner-Denver* and its progeny might otherwise have has been wiped out by *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).[5]

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[5] Additionally, the Fourth Circuit intimated that if *Gardner-Denver* was not overruled by *Gilmer* itself it was negated by Congress with respect to Title VII and the ADA. Pet. App. 10a-12a.

The essentially identical provisions upon which the Fourth Circuit relied provide only that "[w]here appropriate and to the extent authorized by law, the use of alternative dispute resolution, including . . . arbitration, is encouraged . . ." 42 U.S.C. § 12212 (ADA); Pub. L. No. 102-66, § 118, 105 Stat. 1071, 1081 (Civil

In *Gilmer*, this Court enforced an agreement entered into by an individual security industry employee to arbitrate rather than litigate in court his employment discrimination claims. In so holding, the Court relied on a set of recent cases enforcing under the Federal Arbitration Act prospective agreements to arbitrate statutory causes of action. 500 U.S. at 33; *see also id.* at 26 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and its progeny). Thus, *Gilmer* involved a prospective waiver by the very individual who later attempted to avoid his own agreement and file suit in court.

The employee in *Gilmer* nonetheless argued that "*Alexander v. Gardner-Denver* . . . and its progeny . . . preclude arbitration of employment discrimination claims." 500 U.S. at 35. This Court responded that "Gilmer's reliance on these cases . . . is misplaced," not, as the Fourth Circuit would have it, because *Gardner-Denver* is "old law", no longer entitled to respect (Pet. App. 12a), but because of "important distinctions between the *Gardner-Denver* line of cases and [the *Gilmer* case]." 500 U.S. at 35.

In particular, *Gilmer* stressed that "the arbitration in those cases occurred in the context of a collective bargaining agreement." 500 U.S. at 36. In that context,

> [T]he claimants [are] represented by their unions in the arbitration proceedings. An important concern therefore [is] the tension between collective repre-

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Rights Act of 1991, applicable to Title VII). These vague provisions do not, however, specify whether it *is* "appropriate" or "authorized by law" to require use of collective bargaining agreement grievance/arbitration procedures to adjudicate ADA or Title VII rights. And, the legislative history of both provisions states that the intent was to preserve, not displace, this Court's decision in *Gardner-Denver* regarding whether it is "appropriate" to mandate arbitration of Title VII and ADA rights under collective bargaining agreement grievance/arbitration provisions. H.R. Rep. No. 485, 101st Cong. 2nd Sess. (1990) at 76-77 (ADA); H.R. Rep. No. 40, 102nd Cong. 2nd Sess. (1991) 97 (1991 Civil Rights Act).

> sentation and individual statutory rights, a concern not applicable in the present case. [500 U.S. at 36.]

Thus, *Gilmer* reaffirms rather than abandons the recognition in the *Gardner-Denver* line of cases that there is inherent tension between federal labor policy encouraging the collective resolution of terms and conditions of employment through collective bargaining between unions and employers and the particular federal statutory protections accorded to each individual employee, *as an individual*, by certain employment rights, including the right to be free of discrimination based on sex or disability. And, nothing in *Gilmer* disturbs the conclusion of *Gardner-Denver* and its progeny that this tension is to be resolved by the rule permitting individual employees to pursue the statutory procedures available to vindicate their individual statutory employment rights, even if there is also a collectively bargained grievance/arbitration method available to them for the adjudication of individual employment rights, statutory or otherwise. *See also Livadas v. Bradshaw*, 114 S. Ct. 2068, 2080 n.21 (1994) (recognizing that *Gilmer* "emphasized the basic consistency [of *Gilmer*] with our unanimous decision in . . . *Gardner-Denver* . . ." because of, inter alia, "the concern that in collective bargaining arbitration 'the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.' ")

Equally to the point, the two fundamental affirmative premises of the *Gilmer* holding do not, as the Fourth Circuit supposed, support any requirement that individual employees submit their federal statutory individual employment right claims to arbitration simply because of the availability of a collectively-bargained grievance/arbitration procedure.

Gilmer rests most prominently on the principle that " 'having made the bargain to arbitrate, the party should be held to it.' " 500 U.S. at 26, *quoting Mitsubishi, supra*, 473 U.S. at 26. But where there is a collective bargain-

ing agreement, the parties to the agreement are not the individual employee and the employer but the union and the employer.

The Fourth Circuit, without so much as a word of explanation, treats the individual's commitment to arbitrate in *Gilmer* as the legal equivalent of the union arbitration commitment here. But on any serious assessment the two are qualitatively different for purposes of determining what kind of commitment suffices to work a waiver of a statutory right. *Gilmer* rests on the by no means unproblematic understanding that the law treats an individual arbitration promise in the circumstance there as binding and enforceable. But, *Gardner-Denver's* theory is that for these purposes, the law does *not* treat the union's arbitration promise as one that is made by each member of the employee group as an individual with regard to individual employee statutory rights and hence binding and enforceable upon each employee in that regard. That theory rests on the Court's understanding of the structure, purpose and policy of the collective bargaining system. The Fourth Circuit contrary *ipse dixit* falls well short of a principled demonstration to the contray.

Gilmer also stressed that individual agreements to arbitrate employment discrimination claims are to be enforced because " '[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " 500 U.S. at 26, *quoting Mitsubishi*, 473 U.S. at 628. But of necessity the impact of requiring employees covered by collective bargaining agreements to use collectively bargained procedures for the adjudication of individual employee statutory protections would be much greater than simply a change of forum.

As the *Gardner-Denver* cases show, contractual grievance/arbitration procedures are—for reasons well-suited to the purposes of adjudicating collective rights but not to

the adjudication of individual statutory rights—*under the ultimate control of the contracting party, the union.* And, the union can decide not to pursue a given case, or to pursue it in a particular manner, as long as the union's decision is not "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). Consequently, to subject individual employee statutory claims to mandatory collective bargaining agreement arbitration would, in many instances, prevent the individual employee from obtaining *any* adjudication of his or her claim, whether because the union believes, correctly or otherwise, that the claim is not a meritorious one, or because the union regards vindication of the claim as against the interest of the represented employee group as a whole.[6]

Far from compelling the result reached by the Fourth Circuit, then, *Gilmer* is inconsistent with that result, both in its explicit refusal to disturb the *Gardner-Denver* line of cases and in its affirmative reasoning.

2. As one would expect given the foregoing, the three other federal courts of appeals that have considered the question have recognized the continued vitality of the *Gardner-Denver* line of cases after *Gilmer* and have continued to follow the *Gardner-Denver* principle.

The Second Circuit, in *Tran v. Tran,* 54 F.3d 115 (2d Cir. 1995) addressed a case, in which an employee suing under the FLSA was covered by a collective bargaining agreement providing for arbitration of "all complaints, disputes, or grievances . . . involving . . . any acts conduct nor relations between the parties." 54 F.3d

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[6] For example, under the ADA, questions often arise regarding whether a collectively-bargained seniority system is to give way to a claim for accommodation of a disabled employee with regard to schedule or work assignment. A union which has negotiated a seniority provision may, believing that the overall interests of the employees in the unit so require, quite properly take a different view of the appropriate interaction between that provision and an individual employee's desire for accommodation than would the employee herself.

at 116 n.2, 117. Noting that *Gilmer* had expressly distinguished *Gardner-Denver*, *Barrentine*, and *McDonald*, the Second Circuit concluded that "[t]here is nothing in *Gilmer* which appears to throw anything but favorable light upon the continuing authority" of those cases, *id.* at 117-18, and held that the plaintiff employee was not required to exhaust the collective bargaining agreement grievance/arbitration procedure.[7]

Similarly, the Tenth Circuit, in *Ryan v. City of Shawnee*, 13 F.3d 345, 347 (10th Cir. 1993) applied *Gardner-Denver* after *Gilmer* to permit an individual's civil rights action to go forward notwithstanding the availability of a collective bargaining agreement arbitration procedure.

And, in *E.E.O.C. v. Board of Governors*, 957 F.2d 424 (7th Cir. 1992), the Seventh Circuit, far from requiring an employee to use an available collective bargaining agreement grievance procedure to adjudicate an ADEA cause of action, held that it is a violation of the ADEA for the agreement itself to do so. *Id.* at 429. Noting that "it is well established that unions cannot waive employees' ADEA or Title VII rights through collective bargaining" (*id.* at 431, citing *Barrentine* and *Gardner-Denver*), the Seventh Circuit recognized that *Gilmer* had "recently held that ADEA claims may, in some circumstances, be subject to compulsory arbitration . . . [but] expressly distinguished cases occurring 'in the context of collective bargaining agreement.'" *Id.* at n.11.

Additionally, the Maine Supreme Judicial Court, in *Winston v. Maine Technical College System*, 631 A.2d 73 (Me. 1993), held that an employee covered by a collec-

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[7] The Fourth Circuit suggested that *Tran* is not apposite because it involved an FLSA rather than an ADA or Title VII cause of action. As the above account of this Court's cases demonstrates, however, *Barrentine* expressly holds that there is *no* distinction of relevance between employment discrimination and FLSA cases with regard to the application of collective bargaining agreement grievance/arbitration procedures.

tive bargaining agreement providing for arbitration and, like the agreement in this case, "establish[ing] a policy against all forms of illegal discrimination" (631 A.2d at 73 n.4)" was not precluded from pursuing his statutory cause of action:

> By merely joining a union, without specifically contracting to arbitrate statutory employment discrimination claims, an employee is not precluded from asserting such claims in litigation . . . We conclude that the instant situation fits within the rule set out in [*Gardner-Denver*, *Barrentine*, and *McDonald*] . . . The vitality of *Alexander* and its progeny was reaffirmed by the Supreme Court in *Gilmer*. [633 A. 2d at 73 & n. 5.]

See also Kirkwood v. Courier-Journal, 858 S.W. 2d 194, 197 (Ct. App. Ky. (1993)) ("Although it is clear that an informed individual may waive a statutory civil right by agreeing to submit any claim against his employer to binding arbitration, *Gilmer* . . ., it is equally the case that such a waiver may not be accomplished prospectively on behalf of an individual by his union or collective bargaining unit. *Gilmer*, —— U.S. at ——, —— 111 S.Ct. at 1656-57.")[8]

The Fourth Circuit opinion, it is true, discusses several cases that have "enforced anticipatory agreements to arbitrate claims involving statutory rights." Pet. App. 13a-19a. But *every one of those cases involved an individual agreement to arbitrate*. None arose in the context of a collective bargaining agreement. Indeed,

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[8] While there are no appellate court cases agreeing with the Fourth Circuit's view of the impact of *Gilmer* on *Gardner-Denver*, a recent Seventh Circuit order states that an argument based on the Fourth Circuit's decision in this case is "not insubstantial." *Pryher v. Tractor Supply Co.*, No. 95 C 211, order of July 31, 1966. Additionally, at least one district court outside the Fourth Circuit has followed the Fourth Circuit's decision here. *Jessie v. Carter Health Care Center*, 1996 U.S. Dist. LEXIS 10021, * 6 (E.D. Ky. July 17, 1996).

several of the federal appellate cases relied upon by the court below specifically recognize that *Gilmer* reaffirmes *Gardner-Denver* and its progeny with regard to collective bargaining agreements, and emphasize that the case before the court did not come under the *Gardner-Denver* collective bargaining agreement rule because the individual plaintiff had agreed prospectively to arbitrate. *See Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 230 (5th Cir. 1991); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 308 (6th Cir. 1991); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992). Thus, those cases as well reaffirm the distinction recognized in *Gilmer* between individual agreements to arbitrate and collective bargaining agreement grievance/arbitration provisions, and for that reason also conflict with the decision below, which denies that there is any such distinction.

This Court has long recognized that uniformity in the law concerning collective bargaining agreements is essential to the federal labor policy generally and, particularly, to "the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." *Teamsters v. Lucas Flour*, 369 U.S. 95, 104 (1962). As things stand now, a single collective bargaining agreement applying to plants in New York, Maine, and Maryland may be read in Maryland, but not in New York or Maine, to mandate the submission of individual employee federal statutory rights claims to the agreement's grievance/arbitration procedure. This disuniformity and its potential impact on the bargaining process, in itself, warrants the grant of *certiorari* here to reestablish one nationwide rule on the question presented.

3. Finally, as the large number of cases in the *Gardner-Denver* line in which this Court granted review and issued a decision on the merits attests, this case particularly merits this Court's attention because of its profound implications for the workings of the dual federal policies that, together, govern the workplace.

To make good on this society's commitment to individual dignity and equal employment opportunity, Congress and the States have enacted a wide range of statutory protections running to employees *as individuals*, and have provided such employees with concomitant causes of action to vindicate their rights in court. At the same time, from similar motives, unions have negotiated thousands of contractual provisions covering millions of employees that establish *parallel* protections and make those provisions enforceable through contractual grievance/arbitration systems, in which the union acts as a "public prosecutor" subject to a duty of fair representation.

Gardner-Denver recognizes that the public law individual rights system and the collectively bargained contractual rights system are separate and distinct, and that the latter supplements but does not displace the former. The Fourth Circuit's decision here is to the contrary.

By any measure the Fourth Circuit view would work a sea change in individual rights, in the courts' role in vindicating those rights and in the role of the collective bargaining system and of unions as the exclusive representatives of employee groups. It is very much to the point in this regard that the recognition that the collective bargaining system and the system of individual employee protective laws are two complementary but distinct labor law regimes, reflected in the *Gardner-Denver* rule, is fundamental to this Court's *overall* federal labor policy jurisprudence. A blurring of that distinction not only unsettles the present balances between arbitration and court litigation but the more general rules—such as the rules that calibrate the preemptive power of LMRA § 301—that determine both the effective scope, and the proper means of vindicating, collective employment rights and individual employment rights. *See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (no preemption of individual employee causes of action where there is no need to interpret a collective bargaining agree-

ment, because, *inter alia*, the federal policy favoring labor arbitration under collective bargaining agreements has no application where employee rights independent of the collective bargaining agreement are at stake).

In sum, this case is one in which the Fourth Circuit decided an issue that has wide ramifications for the governance of the American workplace in a manner that gives short-shrift to the complexities of that issue, ignores this Court's previous resolution of those complexities, and creates a square conflict among federal appellate courts and with state high courts. This Court should therefore grant *certiorari* to decide whether *Gilmer* works a fundamental change in this Court's previous jurisprudence concerning the interaction of the two forms of federal law governing the workplace, or instead, as we maintain, preserves the fundamental line between collective and individual employment rights announced in *Gardner-Denver* and is progeny.

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1213, No. 94-1265

LINDA AUSTIN,
Plaintiff-Appellant,
v.

OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED,
Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amici Curiae.

LINDA AUSTIN,
Plaintiff-Appellee,
v.

OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED,
Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amici Curiae.

Appeals from the United States District Court
for the Western District of Virginia at Danville.
Jackson L. Kiser, Chief District Judge.
(CA-93-51-D)

Entered March 12, 1996

OPINION

WIDENER, Circuit Judge:

Linda Austin filed suit in the United States District Court for the Western District of Virginia against Owens-Brockway Glass Container, Inc., alleging violations of Title VII and the Americans with Disabilities Act (Disabilities Act or ADA). The district court granted summary judgment in favor of Owens-Brockway because Miss Austin failed to submit her claims to mandatory arbitration under a collective bargaining agreement. Miss Austin appeals, claiming that the district court incorrectly held that she was required to arbitrate her statutory claims. Finding no error, we affirm with only slight modification.

I.

Because the district court disposed of Miss Austin's claims on a motion for summary judgment, all justifiable inferences of relevant facts are drawn in favor of the plaintiff. The grant of summary judgment is reviewed *de novo*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Miss Austin worked for Owens-Brockway for approximately 14 years until she was injured on the job in 1992. Her physician released her for light-duty work in August 1992, but Owens-Brockway informed her that no light-duty employment was available. Instead, Miss Austin was put on medical leave and provided with workers' compensation benefits. While Miss Austin was on leave, Owens-Brockway eliminated Miss Austin's job classification of equipment cleaner/oiler-greaser. In June 1993, Miss Austin met with Robert McCauley, the Director of Industrial Relations at Owens-Brockway. She learned that Owens-Brockway had terminated her employment and that she would not be reassigned to light-duty work.

Miss Austin filed suit against Owens-Brockway on October 13, 1993. She alleged Owens-Brockway violated the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and Title VII, 42 U.S.C. § 2000e *et seq.*, by refusing to offer her light-duty work and by terminating her employment while a male employee, the only other employee in her eliminated job classification, was reassigned to another position at the plant.

Owens-Brockway filed a motion to dismiss for lack of subject matter jurisdiction. The company argued that Miss Austin failed to file her claim with the EEOC and had not obtained a right to sue letter, both prerequisites to filing Disabilities Act and Title VII claims in court. See 42 U.S.C. §§ 2000e-5(b), 12117(a). Further, Owens-Brockway took the position that Miss Austin's claims were subject to mandatory arbitration under a collective bargaining agreement covering her employment with Owens-Brockway. Because Miss Austin failed to file a claim under the grievance-arbitration procedure, Owens-Brockway maintained that she was precluded from filing suit in federal court.

Owens-Brockway offered affidavits in support of its motion to dismiss, so the district court treated the motion as one for summary judgment. Fed. R. Civ. P. 12(b). The district court found that a significant factual dispute existed as to what actions Miss Austin took to file her complaint with the EEOC, and therefore, without deciding the question, declined to grant summary judgment for failure to file a claim or obtain a right to sue letter.[1]

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[1] Since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction, see *Big Vein Pochahontas Co. v. Browning*, 120 S.E. 487 (Va. 1928); *Burks Pleading and Practice*, § 12 (4th ed. 1952), each of the two defenses asserted here is essentially a plea to the jurisdiction. We need decide only one of them and decide the failure to submit the claim to the grievance-arbitration procedure. The cross-appeal of Owens-Brockway, No. 94-1265, with respect to filing a claim with the EEOC and obtaining a right to sue letter is dismissed without prejudice, and we express no opinion on the question.

The district court granted summary judgment in favor of Owens-Brockway based on Miss Austin's failure to process her claims under the grievance-arbitration procedure in the collective bargaining agreement. The court held that that agreement subjected Miss Austin's claims to mandatory arbitration. Thus, the court held that under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), because she did not submit her claim to arbitration under the collective bargaining agreement, she was precluded from bringing the lawsuit.

II.

A.

Miss Austin first takes the position that she did not have standing under the collective bargaining agreement to arbitrate her dispute with her employer for gender and disability-based claims of discrimination. The argument goes that having no standing, she could not comply with the contract. She now takes the position that she had been discharged and, as a discharged employee, she had no standing to request or demand arbitration of such claims. There is no merit to this position, however. First, the district court found that the alleged discrimination plaintiff complains of occurred on June 1, 1993, the date the defendant terminated Miss Austin's employment. It also found that on June 1, 1993, the April 1, 1993-March 31, 1996 Union Shop Contract was in effect. Plaintiff takes no exception to these findings. So any contractual rights plaintiff may have had on account of that discrimination arose during the term of the collective bargaining agreement in question and plaintiff could assert her rights under that contract. Second, even if plaintiff had been a terminated employee, she could have asserted any rights she had under the collective bargaining agreement even after its termination. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 51 L. Ed. 2d 300, 97 S. Ct. 1067 (1977), affirmed our

decision that an employer and employee's "arbitration duties under the [collective bargaining] contract survived its termination with respect to claims arising by reason of the collective bargaining agreement." 430 U.S. at 248. *Nolde Bros.* held that a "Union's claim for severance pay under [an] . . . expired collective bargaining agreement [was] . . . subject to resolution under the arbitration provision of that contract." 430 U.S. at 243. We do not think the case before us is different from *Nolde Bros.* in any significant degree.

Accordingly, we are of opinion and decide that Miss Austin had standing to assert her claims under the collective bargaining agreement.

B.

The next argument of Miss Austin is that arbitration of her Title VII and disability claims is permissive rather than mandatory. She relies on Section 1, Article 32 of the collective bargaining agreement which states that "all disputes not settled pursuant to the procedures set forth in Article 31, Grievance Procedures, may be referred to arbitration." She takes the position that the use of the word "may" as just stated makes arbitration permissive rather than obligatory. We are of opinion, however, that the purpose of the word "may" in this section of the collection bargaining agreement is to give an aggrieved party the choice between arbitration and abandonment of his claim, he "may" either arbitrate or abandon the claim. The interpretation urged by Miss Austin would render the arbitration provision meaningless for all practical purposes. If the parties to such an agreement intended for arbitration to be permissive, there would be no reason to include Article 32, the arbitration provision in the contract, for the parties to an existing dispute could always voluntarily submit it to arbitration. Almost identical words ("either party may request arbitration") in a fact situation indistinguishable from that at hand has received

the same construction we place upon it by the Eighth Circuit in *Bonnot v. Congress of Independent Unions, Local No. 14*, 331 F.2d 355, 359 (8th Cir. 1964), which followed *Deaton Truck Line, Inc. v. Local Union 612*, 314 F.2d 418, 422 (5th Cir. 1963). See also *American Italian Pasta Co. v. Austin Co.*, 914 F.2d 1103, 1104 (8th Cir. 1990).

Thus, we decide that the arbitration provisions in the collective bargaining agreement are obligatory and not permissive.

III.

A.

In deciding whether to enforce the arbitration provision in this collective bargaining agreement, we start with and rely upon the "well-recognized policy of federal labor law favoring arbitration of labor disputes." *Adkins v. Times-World Corp.*, 771 F.2d 829, 831 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 88 L. Ed. 2d 930, 106 S. Ct. 896 (1986). In the *Steelworkers Trilogy*, the Supreme Court established that arbitration is favored in labor disputes. See e.g., *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 4 L. Ed. 2d 1424, 80 S. Ct. 1358 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960). We need not rely on the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, in this case because, in this circuit, the FAA is not applicable to labor disputes arising from collective bargaining agreements. *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1067 (4th Cir. 1993).

B.

The collective bargaining agreement specifically provides that claims of gender and disability discrimination are subject to the grievance procedure:

ARTICLE 38

Fair Employment Practice and Equal Opportunities

> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of race, color, religion, sex, national origin, age, handicap, or veteran status.
>
> 2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act. Before taking action relative to this Section, the Company will meet with the Local Union, and both parties will have sufficient opportunity to express their opinions regarding an anticipated action.
>
> 3. Any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure.

Therefore, Miss Austin contractually agreed to submit her discrimination claims to the grievance procedure.

The grievance procedure specifically provides for binding arbitration.

ARTICLE 32

Arbitration

1. All disputes not settled pursuant to the procedure set forth in Article 31, Grievance Procedure, may be referred to arbitration by a notice given to the company or the union by the other within 10 days after the conclusion of Step 4 of the grievance procedure. . . .

* * * *

> 5. . . . . The arbitrator's decision shall be final and binding upon both parties.

As we have just demonstrated above, the collective bargaining agreement specifically provides for final and binding arbitration on account of each complaint as-

serted here: Title VII for the gender claim, and the Disabilities Act for the disability claim. And in part II.B, we have decided that such arbitration is obligatory, not discretionary.

C.

In *Gilmer*, the Supreme Court made clear that agreements to arbitrate statutory claims are enforceable. *Gilmer*, 500 U.S. at 26. The *Gilmer* Court recognized that arbitration of a statutory claim is not equal to giving up any right under a statute, it is simply another forum in which to resolve the dispute:

> [B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Gilmer, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)). *Gilmer* thus rejects the principal concern in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), that arbitration is an "inappropriate forum" for the resolution of Title VII statutory rights. *Alexander*, 415 U.S. at 56.

Emphasizing its support of arbitration as a method of dispute resolution, the *Gilmer* Court stated:

> [A]ttacks on [the adequacy] of arbitration "rest on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."

Gilmer, 500 U.S. at 30 (third alteration in original) (quoting *Rodriguez de Quijas v. Shearson/American Ex-*

press, Inc., 490 U.S. 477, 481, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)). The Court rejected arguments that arbitration panels may be biased; that limited discovery would hinder a plaintiff attempting to prove discrimination; that lack of a written opinion would result in decreased public awareness of discriminatory employment policies and ineffective appellate review; and that employers and employees have unequal bargaining power. *Gilmer*, 500 U.S. at 30-33. The Court refused to presume that arbitrators would be biased, *Gilmer*, 500 U.S. at 30; explained that choosing arbitration means "trading the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration," *Gilmer*, 500 U.S. at 31 (quoting *Mitsubishi*, 473 U.S. at 628); noted that judicial review of arbitration awards, although limited, is adequate to ensure compliance with statutory requirements, *Gilmer*, 500 U.S. at 32 n.4; refused to decide that lack of class actions should bar arbitration, because individual conciliation should not be barred; and decided that the claim of unequal bargaining power is one that should be decided in individual cases, *Gilmer*, 500 U.S. at 32-33.

Gilmer further provides that once parties have contracted to arbitrate a statutory matter, the parties should be held to that agreement unless Congress intended to prohibit arbitration of that matter:

> "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." . . . If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an "inherent conflict" between arbitration and the [statute's] underlying purposes.

Gilmer, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628).

The language of the statutes could not be any more clear in showing Congressional favor towards arbitration. The Civil Rights Act of 1991, amending Title VII, states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081. The Americans with Disabilities Act contains identical language:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter.

42 U.S.C. § 12212. The meaning of this language is plain —Congress is in favor of arbitration.

A study of the legislative history of the Civil Rights Act and the Disabilities Act also does not reveal Congressional hostility towards arbitration, rather Congress has encouraged arbitration. See H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78, *reprinted in* 1991 U.S.C.C.A.N. 694, 764; H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 549, 635; H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess. (1990); H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598; H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 76-77, *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500. *Gilmer* provides that we look for a Congressional intent to preclude arbitration of the particular statutory rights. *Gilmer*, 500 U.S. at 26. We do not find that intent in the legislative history. In fact, the legislative history for both the Disabilities Act and the Civil Rights Act contains statements that demonstrate the opposite intent:

> This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. . . .
>
> This amendment was adopted to encourage alternative means of dispute resolution that are already authorized by law.

H.R. Conf. Rep. No. 755, 101st Cong., 2d Sess. (1990) (Civil Rights Act); H.R. Rep. No. 485(III), 1st Cong., 2d Sess. 76, *reprinted in* 1990 U.S.C.C.A.N. 445, 499 (ADA).

Granted, the legislative history of the statutes is not as clear as the statutes themselves that Congress intended to allow arbitration of statutory claims, and one of the conference reports does indicate that arbitration is permissible when voluntary. H.R. Conf. Rep. No. 596, 101st Cong., 2d Sess. 89 (1990), *reprinted in* 1990 U.S.C.C.A.N. 565, 598 ("It is the intent of the conferees that the use of these alternatives dispute resolution procedures is completely voluntary."). In this circuit, conference reports are the most persuasive evidence of legislative intent, after the statute itself. *Davis v. Lukhard,* 788 F.2d 973, 981 (4th Cir.), cert. denied, 479 U.S. 868 (1986). Furthermore, a committee report states that "voluntary mediation and arbitration are far preferable to prolonged litigation for resolving employment discrimination claims." H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 78, *reprinted in* 1991 U.S.C.C.A.N. 694, 764. Another committee report contains a statement about what that committee "believes" the effect of the statute is, however, that committee's belief is not dispositive of what Congress intended when it enacted the statute. H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 97, *reprinted in* 1991 U.S.C.C.A.N. 549, 635 ("The Committee believes that any agreement to submit disputed issues to arbitration, . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with . . . *Alexander*. . . ."). We need not decide what the legisla-

tive history means in absolute terms because in our case it means that voluntary agreements to arbitrate statutory claims are allowed. To decide otherwise, we would have to hold that *Gilmer* has no effect at all and that *Alexander* is still the law that statutory claims cannot be the subject of required arbitration. We do not think Congress intended to return to the old law. Miss Austin's burden under *Gilmer* is to show that Congress intended to preclude arbitration of statutory claims, and she has failed to meet that burden. Even if the provisions of the legislative history are contrary to the statute, the statute must prevail. *Davis v. Lukhard,* 788 F.2d at 981. Especially in that event, the reasoning of Justice Scalia, concurring, in *Thompson v. Thompson,* 484 U.S. 174, 188, 191-192, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988), should apply: "Committee reports, floor speeches, and even colloquies between Congressmen, . . . [only page references omitted] are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."

Moreover, there is no inherent conflict between arbitration and the underlying purposes of the Disabilities Act or Title VII. Although *Gilmer* involved a claim under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.*, the principles behind the Age Discrimination Act are the same as those behind the Disabilities Act and Title VII. The statement of the Court in response to *Gilmer*'s claim that compulsory arbitration would be inconsistent with the purposes of the Age Discrimination Act holds true for any claim that compulsory arbitration would be inconsistent with the policies behind the Disabilities Act and Title VII. The Court replied:

> As *Gilmer* contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims. It is true that arbitration focuses

> on specific disputes between the parties involved. The same can be said, however, of judicial resolution of claims. Both of these dispute resolution mechanisms nevertheless also can further broader social purposes. The Sherman Act, the Securities Exchange Act of 1934, RICO, and the Securities Act of 1933 all are designed to advance important public policies, but, as noted above, claims under those statutes are appropriate for arbitration. "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."

Gilmer, 500 U.S. at 28 (alterations in original) (internal citations omitted (quoting *Mitsubishi*, 473 U.S. at 637). The Court clearly has removed any doubt that age discrimination claims may be arbitrated. We are of opinion that the same reasoning is valid for gender and disability discrimination claims.

D.

Every case decided in the Courts of Appeal under § 118 of the 1991 amendments to the Civil Rights Act has enforced anticipatory agreements to arbitrate claims involving statutory rights.[2] Three federal cases arose in

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[2] The dissent relies upon *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), for a conflict in the circuits. We think that reliance is misplaced, for Tran was a wage and hour case and has few similarities to the case at hand, as we will now discuss.

The first, and a patent difference, is that the wage and hour law, 29 U.S.C. § 201, et seq. (the Fair Labor Standards Act) does not contain any provision encouraging arbitration as does Title VII (§ 118 of the 1991 amendment), and the Disabilities Act (42 U.S.C. § 12212), each of which states that "arbitration is encouraged to resolve disputes arising under" the respective statutes.

If that were not all, the Court has stated in *Gilmer* that ". . . all statutory claims may not be appropriate for arbitration . . . ." 500 U.S. at 26. In *Barrentine v. Arkansas-Best Freight System*,

the context of arbitration clauses in employment contracts growing out of securities registration applications. *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698 (11th Cir. 1992); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d

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Inc., 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981), a wage and hour case which involved an arbitration provision in a collective bargaining agreement, the Court declined to require arbitration prior to filing suit, principally on the ground that it had held that "congressionally granted FLSA rights take precedence over conflicting provisions in a collective bargaining compensation arrangement," 450 U.S. at 740, and followed four of its previous decisions in that respect. 450 U.S. at 741. Similarly, as the dissent relies on *McDonald v. West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984), and *Livadas v. Bradshaw*, 129 L. Ed. 2d 93, 62 U.S.L.W. 4495, 114 S. Ct. 2068 (1994), we note that both *McDonald* and *Livadas* are cases under 42 U.S.C. § 1983, and that *McDonald* reasoned that "an arbitration proceeding cannot provide an adequate substitution for a judicial trial." 466 U.S. at 292. *Livadas's* reasoning was that "Congress, of course, has given no more indication of any intent to foreclose actions like Livadas's than the sort brought by the cab company [in the *Golden State* cases]." 62 U.S.L.W. at 4503.

Tran depends on *Barrentine* for its decision that an employee, subject to a collective bargaining agreement with an arbitration procedure, is not required to arbitrate wage and hour claims prior to filing suit under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. With respect to discrimination claims, however, the Supreme Court distinguished *Barrentine* in *Gilmer* itself by stating that "reliance . . . is misplaced" "on *Alexander* and its progeny, *Barrentine* . . . and *McDonald* . . . .", for the proposition that would "preclude arbitration of employment discrimination claims." *Gilmer*, 500 U.S. at 33. *Gilmer* continued with regard to the *Alexander* line of cases:

> First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agree-

305 (6th Cir. 1991); *Alford v. Dean Witter Reynolds, Inc,*. 939 F.2d 229 (5th Cir. 1991). A fourth federal case arose in the context of an arbitration clause in an ordinary employment contract. *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932 (9th Cir. 1992). And two state cases also arose in the context of arbitration clauses in employment contracts growing out of securities registration applications. *Benefits Communications Corp. v. Klieforth*, 642 A.2d 1299 (D.C. 1994); *Fletcher v. Kidder, Peabody & Co.*, 81 N.Y.2d 623, 619 N.E.2d 998, 601 N.Y.S.2d 686 (N.Y. 1993), cert denied, 126 L. Ed. 2d 455, 114 S. Ct. 554 (U.S. 1993).

Bender v. A.G. Edwards & Sons, Inc. involved an employee who, in her application for registration as a stock broker, agreed to arbitrate employment disputes. *Bender* 971 F.2d at 699. When the employee filed a sexual harrassment suit in federal court, the employer moved to stay the case pending arbitration under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq. Bender*, 971 F.2d at 699. The Eleventh Circuit found, in light of *Gilmer*, that title VII claims can be subject to compulsory arbitration

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ment, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the FAA, which, as discussed above, reflects a "liberal federal policy favoring arbitration agreements."

Gilmer, 500 U.S. at 35 (quoting in the last two lines, *Mitsubishi*, 473 U.S. at 625). Our case, like *Gilmer*, involves the issue of the enforceability of an agreement to arbitrate statutory claims. This case arises in the context of a collective bargaining agreement so there may be concern for any tension between collective representation and statutory rights. As we find in part III.B, however, Miss Austin is a party to a voluntary agreement which has explicitly agreed to the arbitration of her statutory complaints. That should be enforced. Finally, as noted in part III.A, although we do not rely on the FAA in this case, we do rely on the federal labor law policy encouraging arbitration of labor disputes as expressed in the *Steelworkers Trilogy*.

and remanded the case with orders that the district court stay federal court proceedings pending the employee's arbitration of her Title VII claim. *Bender*, 971 F.2d at 699, 701.

Willis v. Dean Witter Reynolds, Inc. also involved an employee who agreed to arbitrate employment disputes when she signed a securities registration form. *Wills*, 948 F.2d at 306. When the employee filed state claims of sexual harassment and gender discrimination in a Kentucky court, the employer removed the case to federal court based on diversity jurisdiction. *Willis*, 948 F.2d at 306. The employee then amended her complaint to include a claim under Title VII. *Willis*, 948 F.2d at 306. The Sixth Circuit noted that the Supreme Court, in *Gilmer*, held enforceable the same arbitration clause at issue in that case. *Willis*, 948 F.2d at 307. The court discussed *Gilmer*'s rejection of the *Alexander* principle that employment discrimination claims could not be arbitrated and *Gilmer*'s support of arbitration as an alternative forum for resolution of disputes involving statutory rights. *Willis*, 948 F.2d at 308-10. The court concluded that the employee's discrimination claim was subject to her agreement to arbitrate. *Willis*, 948 F.2d at 312.

Alford v. Dean Witter Reynolds, Inc., was yet another case in which an employee sued her stock broker employer and alleged a violation of Title VII. *Alford*, 939 F.2d at 229. The case was first decided favorably to *Alford* in the lower courts, but the Supreme Court vacated the judgment of the Fifth Circuit and remanded the case for consideration in light of *Gilmer*. *Alford*, 939 F.2d at 229. The Fifth Circuit compared Title VII to the Age Discrimination Act, under which the Supreme Court decided *Gilmer*, and concluded that because the civil rights statutes were similar, claims under Title VII could be arbitrated just as claims under the Age Discrimination Act could be arbitrated. *Alford*, 939 F.2d at 230. The court noted *Gilmer*'s rejection of the *Alexander* principle that arbitration was unfavored. *Alford*, 939 F.2d at 230.

Mago v. Shearson Lehman Hutton, Inc. involved an employee who, in her employment application, agreed to arbitrate employment disputes. *Mago,* 956 F.2d at 933-34. When the employee filed a sexual harassment and gender discrimination suit against her employer, the employer moved to stay the case pending compulsory arbitration. *Mago,* 956 F.2d at 934. The Ninth Circuit concluded that the employee did not meet her burden under *Gilmer* of proving that Congress intended to preclude arbitration of Title VII claims and enforced the arbitration agreement. *Mago,* 956 F.2d at 935.

The District of Columbia Court of Appeals also has enforced an anticipatory agreement, in a securities registration application, to arbitrate employment disputes. *Benefits Communications Corp. v. Klieforth,* 642 A.2d 1299 (D.C. 1994). The employee filed a gender discrimination suit in Superior Court prior to the Supreme Court's *Gilmer* decision, and six weeks after *Gilmer* was decided the employer moved to compel arbitration. *Klieforth,* 642 A.2d at 1300. Although the employee's claim arose under the District of Columbia's Human Rights Act, the court explained that it usually looked to federal civil rights cases for guidance in interpreting the Human Rights Act. *Klieforth,* 642 A.2d at 1301-02. The court noted that *Gilmer* held that an agreement to arbitrate age discrimination claims could be enforced and that every federal court of appeals to decide the issue has extended *Gilmer* to cover Title VII discrimination claims. *Klieforth,* 642 A.2d at 1302 (citing *Bender, Mago, Willis,* and *Alford*). The court recognized that federal precedent "holds that employment discrimination claims can be subject to arbitration if the employer and employee have agreed to arbitrate disuptes of that nature." *Klieforth,* 642 A.2d at 1303. Accordingly, the court found that the arbitration agreement was enforceable. *Klieforth,* 642 A.2d at 1304.[3]

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[3] The court also found that the 1991 amendments to the Civil Rights Act of 1964 did not modify or overrule *Gilmer. Klieforth,*

The Court of Appeals of New York has addressed the enforceability of agreements to arbitrate statutory claims, again in the context of employment contracts growing out of securities registration applications, and held that the agreements were enforceable. *Fletcher v. Kidder, Peabody, Co.*, 81 N.Y.2d 623, 619 N.E.2d 998, 1005-06, 601 N.Y.S.2d 686 (N.Y. 1993) *Fletcher* consolidated two cases, one involved a race discrimination claim and the other involved a gender discrimination claim *Fletcher*, 619 N.E.2d at 1000. The employees had agreed to arbitrate employment disputes when they signed securities registration applications at their respective firms. One employee filed a race discrimination claim and the other employee filed a gender discrimination claim, and each employer moved to compel arbitration under the respective agreements. *Fletcher*, 619 N.E.2d at 1000. In light of *Gilmer*, the court overruled a prior decision that held that anticipatory agreements to arbitrate employment discrimination claims were not enforceable. *Fletcher*, 619 N.E.2d at 1003. Finding Title VII comparable to the state law under which the case was to be decided, the court analyzed the legislative history of Title VII to find evidence of Congressional intent to prohibit anticipatory agreements to arbitrate statutory disputes. The court found no evidence of any such intent. *Fletcher*, 619 N.E.2d at 1003. The court discussed *Gilmer*'s recognition of arbitration as a favorable method of dispute resolution and stated that after *Gilmer*, the question is "whether Congress, in creating a statutory remedy, intended that arbitration of the statutorily established claim would be foreclosed." *Fletcher*, 619 N.E.2d at 1004.

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642 A.2d at 1304. While we agree with the court's statement that the statute on its face "expressly encourages" arbitration as an alternative to litigation, we are not in entire agreement with the statement that it is not necessary to consider the statute's legislative history. *Klieforth*, 642 A.2d at 1305. *Gilmer* names legislative history as a place to look to discover Congressional intent to preclude arbitration of statutory claims. *Gilmer*, 500 U.S. at 26.

The only diffeernce between these six cases and this case is that this case arises in the context of a collective bargaining agreement. *Bender, Willis, Alford, Klieforth,* and *Fletcher* arose in the context of employment contracts growing out of securities registration applications, and *Mago* also arose in the context of an employment contract. In all of the cases, however, including the case at hand, the employee attempting to sue had made an agreement to arbitrate employment disputes. Whether the dispute arises under a contract of employment growing out of securities registration application, a simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of the opinion it should be enforced.

E.

A union has the right and duty to bargain for the terms and conditions of employment. 29 U.S.C. § 158(d). Through the collecitve bargaining process, unions may waive the right to strike and other rights protected under the National Labor Relations Act, 29 U.S.C. § 151 *et seq. Metropolitan Edison Co. v. NLRB,* 460 U.S. 693, 705, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983). The Supreme Court finds such waivers "valid because they rest on the premise of fair representation." *Metropolitan Edison,* 460 U.S. at 705 (citations omitted). There is no reason to distinguish between a union bargaining away the right to strike and a union bargaining for the right to arbitrate. The right to arbitrate is a term or condition of employment, and as such, the union may bargain for this right. This has been the law at least since *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957); "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Lincoln Mills,* 353 U.S. at 455.

F.

Finally, the rule of the Supreme Court and this circuit is that an employee must follow the grievance procedure established by the collective bargaining agreement prior to filing suit in federal court. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 13 L. Ed. 2d 580, 85 S. Ct. 614 (1965); *Adkins v. Times-World Corp.*, 771 F.2d 829, 832 (4th Cir. 1985), *cert. denied*, 474 U.S. 1109, 88 L. Ed. 2d 930, 106 S. Ct. 896 (1986). Thus, an employee cannot sue an employer without first going through the grievance procedure, and this is what Miss Austin is attempting to do. We need not decide any question of union good faith in this case (and none has been suggested), because Miss Austin must pursue her claim under the grievance procedure.

Miss Austin is a party to a voluntary agreement to submit statutory claims to arbitration. The collective bargaining agreement specifically lists gender and disability discrimination as claims that are subject to arbitration. This voluntary agreement is consistent with the text of Title VII and the Disabilities Act, the legislative intent behind those statutes, and the purposes of those statutes. Finding that Congress did not intend to preclude arbitration of claims under Title VII and the Disabilities Act, we hold that the arbitration provision in this collective bargaining agreement is enforceable.

IV.

We express no opinion as to whether or not arbitration may now be available or the result thereof. That question is not before us.

We have examined the final order disposing of the case in the district court and are not clear as to whether or not the disposition was without prejudice to the merits of Miss Austin's claim. Since we have affirmed an adjudication

that the court could not hear the same because of agreed-upon arbitration, the dismissal of the case should be without prejudice to the merits of the claim asserted. Whether or not Miss Austin has abandoned her claim or otherwise rendered it unenforceable by choosing to attempt to litigate the same rather than arbitrate it is also a question upon which we express no opinion.

On remand, the district court will amend its order dismissing the case to insure it expresses no opinion on the merits of the claim, or whether or not the same is subject to arbitration, or whether or not it may now be so asserted.

The judgment of the district court is accordingly

AFFIRMED AS MODIFIED AND THE CASE IS REMANDED.

HALL, Circuit Judge, dissenting:

I respectfully dissent.

After its inventory of cases that follow the holding of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991), the majority concludes, "the only difference between these . . . cases and this case is that this case arises in the context of a collective bargaining agreement." Supra at 17. I agree. The majority fails to recognize, however, that the only difference makes all the difference. A labor union may not prospectively waive a member's individual right to choose a judicial forum for a statutory claim.

I.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), a unanimous Supreme Court held that a person may sue under Title VII notwithstanding that he has submitted his claims to arbitration under a collective bargaining agreement and lost. In reaching this conclusion, the Court stated that an employee's individual statutory right is completely independent of any contractual right he may have under a collective bargaining agreement, and the individual rights of employees are not subject to waiver by their union:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement.
>
> By contrast, in filing a lawsuit under Title VII, an employee asesrts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same occurrence. And cbertainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums.

* * *

> . . . We think it clear that there can be no prospective waiver of an employee's rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. [cites omitted] These rights are conferred on employees collectively ot foster the procesess of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.
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> * * *
>
> We think, therefore, that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim de novo.

415 U.S. at 49-52, 59-60. Thus, under *Gardner-Denver*, a clause in which a union purported to waive employees' rights to pursue Title VII claims in court would be clearly unenforceable. *Gardner-Denver* was closely adhered to in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981), and *McDonald v. City of West Branch*, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984).

II.

Gilmer did not overrule this line of authority. The Supreme Court has said so, twice.

First of all, in *Gilmer* itself, the Court enforced an agreement to arbitrate contained in an *individual* (not collective) contract between a stockbroker and his employer. Writing for a seven-member majority, Justice White was careful to distinguish *Gardner-Denver*. Though he eschewed language in *Gardner-Denver* that expressed judicial mistrust of arbitration, he left its holding intact. He explained that the collective bargaining agreements in *Gardner-Denver* and its progeny did not contain the agreement of the employees to arbitrate statutory claims. Second, and of central importance here, because arbitrations involve contracts negotiated by unions, "an important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." Finally, *Gilmer*, unlike the labor costs, arose under the Federal Arbitration Act. 500 U.S. at 35.

In a more recent unanimous decision, the Court reiterated the vitality of *Gardner-Denver*, albeit in dicta:

> In holding that an agreement to arbitrate an Age Discrimination in Employment Act claim is enforceable under the Federal Arbitration Act, *Gilmer* emphasized its basic consistency with our unanimous decision in [*Gardner-Denver*].

Livadas v. Bradshaw, 129 L. Ed. 2d 93, 114 S. Ct. 2068, 2080 n.21 (1994).

Several federal courts have recognized that *Gardner-Denver*, rather than *Gilmer*, continues to govern in the context of collective bargaining agreements. *Tran v. Tran*, 54 F.3d 115, 117, 118 (2nd Cir. 1995); *Humphrey v. Council of Jewish Federations*, 901 F. Supp. 703, 70-710 (S.D.N.Y. 1995); *Jackson v. Quanex Corp.*, 889 F. Supp.

1007, 1010-1011 (E.D.Mich. 1995); *Randolph v. Cooper Industries,* 879 F. Supp. 518, 520-522 (W.D.Pa. 1994); *Block v. Art Iron, Inc.,* 866 F. Supp. 380, 384-387 (N.D. Ind. 1994); *Griffith v. Keystone Steel & Wire Co.,* 858 F. Supp. 802, 804 (C.D.Ill. 1994); *Claps v. Moliterno Stone Sales, Inc.,* 819 F. Supp. 141, 145-147 (D.Conn. 1993). The case first above listed is a decision of the Court of Appeals for the Second Circuit; consequently, the majority's holding will create a split among the circuits.

Gardner-Denver is the law. Austin may pursue her contractaul remedy, or both. The judgment of the district court should be reversed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

Civil Action No. 93-0051-D

LINDA AUSTIN,
Plaintiff,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,
Defendant.

Entered: January 14, 1994

Judges: Kiser

OPINION BY: JACKSON L. KISER

MEMORANDUM OPINION

By: Jackson L. Kiser, Chief United States District Court Judge

Facts as Alleged in the Complaint:

The facts, according to plaintiff, are such: plaintiff was employed at Owens-Brockway since 1978, working most recently as an equipment cleaner/oil-greaser. In 1992 plaintiff became disabled as the result on an on-the-job injury. Plaintiff was not reasonable accommodated by any offer of light duty employment by Owens-Brockway, for which her doctor had released her. After becoming disabled, defendant learned that Owens-Brockway had eliminated the job title of equipment cleaner/oiler-greaser and had offered the only other equipment cleaner/oiler-greaser—who was a male—reassignment to another position in the plant.

Defendant has moved to dismiss this action pursuant to F.R.Civ.P. 12(b)(6) for lack of subject matter jurisdiction. Defendant has submitted affidavits in support of its motion, and plaintiff has responded as if Defendant's motion was one for Summary Judgment. Accordingly, the Court will treat defendant's motion as a Rule 56 motion.[1] Defendant's motion is based on the following grounds:

> 1. Plaintiff did not obtain a right-to-sue letter from the EEOC before filing her civil suit for violation of the ADA and Title VII, plaintiff was required to file a charge with the EEOC, and that entitlement to a right-to-sue letter from the EEOC was a jurisdictional prerequisite to the instant action.
>
> 2. The Defendant was not given notice of the filing of any charge with the EEOC and was therefore not provided with any opportunity to engage in conciliation of plaintiff's claim as required by Title VII.
>
> 3. The EEOC has not issued the statutory mandated right-to-sue letter to the plaintiff.
>
> 4. The Plaintiff has failed to utilize the grievance arbitration procedure available to her in the collective bargaining agreement which covers her employment with the defendant.

Defendant has also moved pursuant to F.R.Civ.P. 11 and Section 706(k) of Title VII for the imposition of sanctions against plaintiff and her attorney. In support of this motion defendant alleges that plaintiff failed to file a charge with the EEOC and did not obtain a right-to-sue letter prior to instituting the instant action. Defendant

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[1] Rule 12(b) provides in pertinent part:

If, on a motion asserting the defense numbered (6) to dismiss for failurme of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56. . . .

points out that Rule 11 requires an attorney to conduct a pre-filing investigation of law and fact which is objectively reasonable under the circumstances. Defendant asserts that even a cursory review of the law as applied to the instant facts would have revealed that before filing her civil suit for violation of the ADA and Title VII, plaintiff was required to file a charge with the EEOC, and that entitlement to a right-to-letter from the EEOC was a jurisdictional prerequisite to the instant action. Accordingly, defendant moves the Court to sanction plaintiff and her counsel and to award defendant all attorneys' fees incurred by defendant in preparing its Motion to Dismiss.

It is undisputed that plaintiff neither obtained a right-to-sue letter from the EEOC nor waited the statutorily prescribed period before filing her complaint. Plaintiff asserts that she attempted three times to file her complaint with the EEOC and was rejected each time. Plaintiff further asserts that she proffered her complaints to the EEOC on July 15, 1993. The complaint in the instant action was filed on October 13, 1993.[2] Plaintiff contends

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[2] Plaintiff states that "on July 15, 1993, when plaintiff proffered her complaints of discrimination to the EEOC in Richmond, Virginia, plaintiffs complaints were evaluated and were 'administratively rejected' on the same day her complaints were made. EEOC again rejected plaintiffs request for reconsideration. EEOC rejected plaintiff's complaints a third time the following week, upon counsel's request for reconsideration." Plaintiff further argues that "when the EEOC made its 'administrative rejection' of plaintiff's complaints, without further inquiry, on its determination that plaintiff was not a handicapped person, plaintiff had done all she could do in filing her complaint with the EEOC. Plaintiff thereafter was barred, as a consequence of EEOC's 'administrative rejection' of her complaint, from exhaustion of all further administrative remedies, including her right to receive a right-to-sue letter from the EEOC. Response to Defendants Motion for Sanctions, at 2. The purported attempt to file with the EEOC consisted of telephone calls to the EEOC office in Richmond. Whether this would qualify as an attempt to file a complaint which was rejected is very questionable but for the purpose of this motion I will assume plaintiff's efforts constituted an attempt to file.

that the EEOC is not empowered, pursuant to 42 U.S.C. section 2000e-5 to provided for "administrative rejection" of complaints and cites several authorities that purport to support the proposition that a civil suit is the appropriate remedy when the EEOC fails to comply with its statutory obligations to bring civil suit.

Defendants exhaustion argument is simple. Before bringing a civil suit for an ADA violation, the aggrieved party must file a charge with the EEOC. *Dickey v. Greene*, 710 F.2d 1003, 1005 (4th Cir. 1983). If the EEOC does not take action on the charge within 180 days from the date of filing, the aggrieved party may file suit. 42 U.S.C.A. § 2000e-5(f)(1). Defendant argues that because plaintiff neither filed a complaint with the EEOC and thus did not obtain a right-to-sue letter nor waited the 180 period before filing suit, this Court lacks jurisdiction over this action.

Both parties argue that this Court's decision in *Preston v. Commonwealth of Virginia*, 779 F. Supp. 45, 46 (W.D. Va. 1990) is controlling. In *Preston* this Court held that:

> To maintain a Title VII action in a federal court plaintiff must file a complaint with the EEOC and obtain a right-to-sue letter. Title 42 U.S.C. § 2000e-5(e) (1988). Without such a letter, and barring exceptional circumstances, the court cannot properly exercise its jurisdiction over plaintiff's claim. In *Preston* this Court found that it did not have jurisdiction over plaintiffs Title VII claim because:
>
> In the instant case, Ms. Preston did not file a complaint with the EEOC regarding her retaliation claim, thus the EEOC has not investigated plaintiff's claim and the purpose of the precondition [permitting the EEOC first to attempt settlement of the grievance] has not been fulfilled. In addition, plaintiff does not forward any equitable basis which would convince the court to waive the procedural condi-

> tion. This Court does not have jurisdiction over plaintiff's Title VII claim because plaintiff has neither fulfilled the purpose of filing with the EEOC nor has she shown why she need not comply with the filing requirement.

Plaintiff claims that notwithstanding the EEOC's alleged "improper failure to comply with its statutory obligations, it is appropriate for the Court to exercise jurisdiction in this cause under the equitable remedy articulated as the exceptional circumstances" test explained in *Preston*, 799 F. Supp. at 46.[3] Plaintiff argues that the equitable basis for this Court's exercise of jurisdiction in the instant action are set forth in Plaintiff's Response to Defendant's Motion for Sanctions, at 5-6. Defendant argues that plaintiff's reliance on the "exceptional circumstances" exception is misplaced because there is nothing exceptional about plaintiff's failure to comply with the procedural requirements of Title VII. Defendant also cites a case from the E.D.Va. in which Judge Spencer held that the court lacked jurisdiction to consider plaintiff's Title VII claim. Spencer held that the court lacked jurisdiction to consider plaintiff's Title VII claim. *Assa'ad-Faltas v. Commonwealth of Virginia*, 738 F. Supp. 982 (E.D.Va. 1989). In *Assa'ad-Faltas* plaintiff alleged that she filed a claim with the EEOC on May 5, 1989 (the case was decided on May 8, 1989). The EEOC did not issue a right-to-sue letter, and 180 days had not passed since the filing of the charge. Defendant seems to suggest that at the very least *Assa'ad-Faltas* stands for the proposition that the Court can bounce out plaintiff for not waiting the 180 days before filing suit after attempting to file complaint with the EEOC.

There is a significant dispute as to precisely what actions Plaintiff took in bringing her complaint to the atten-

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[3] See *DeFigueiredo v. Trans World Airlines, Inc.*, 322 F. Supp. 1384 (D.C.N.Y. 1971) (stating that 42 U.S.C. § 2000e-5 does not require that a discrimination complaint be filed with the commission when such filing would be a futile act).

tion of the EEOC. Because plaintiff has offered her counsel's affidavit which disputes the statements made in the affidavits submitted by defendant regarding the actions taken by plaintiff in attempting to file a complaint with the EEOC, summary judgment disposition on the issue of plaintiff's noncompliance with Title VII is inappropriate.[4] Because plaintiff's counsel's unsuccessful attempts to file an EEOC complaint may have excused plaintiff from having to wait the 180 day period before filing suit in this Court, sanctions are inappropriate and Defendant's Motion for Sanctions will be denied.

Plaintiff's Failure to Use Grievance Arbitration Procedure

Defendant argues that plaintiff's Complaint should be dismissed because plaintiff failed to use the grievance-arbiration procedure set forth in the collective bargaining agreement between the defendant and the labor organization representing the defendant. Defendant argues that although plaintiff is "off work" she is still employed by defendant and is receiving workers' compensation benefits. Defendant also asserts that plaintiff is covered by a collective bargaining agreement (CBA) between defendant and the Glass, Molders, Pottery, Plastics and Allied Workers International Union. The CBA provides in pertinent part that disputes under the CBA shall be governed by a grievance procedure which provides for the compulsory submission of all disputes . . . to a neutral third party arbitrator whose decision shall be final and binding upon the parties (defendant has republished the relevant sections of the CBA in its Brief in Support of its Motion to Dismiss.

Defendant claims that plaintiff did not follow the grievance procedure set forth in the CBA and is therefore

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[4] Plaintiff's counsel's affidavit states that the EEOC, through Reba Dotson, denied plaintiff's request to file a complaint with the EEOC and asserted the EEOC's authority to administratively reject plaintiff's complaint.

estopped from proceeding in the instant lawsuit. Defendant cites *Gilmer v. Interstate/Johnson Lane Corporation*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991) in which the Supreme Court held that a claim being brought under the ADA of 1967 ". . . can be subjected to compulsory arbitration pursuant to an arbitration agreement. . ." Id. at 1650. Defendant also points to amendments to the Civil Rights Act of 1991 which indicate Congress' preference that employment discrimination claims be resolved in alternative dispute forums. (def. Brief at 13).

Plaintiff argues that defendant's argument in regard to estoppel pursuant to the existing union grievance and arbitration procedure is faulty because defendant fails to appreciate the distinction between compulsory arbitration which requires that all parties enter into binding arbitration, and a non-compulsory, elective arbitration provision which allows either party or neither party to require the other to enter into binding or non-binding arbitration. Plaintiff further asserts that the Union Shop Contract of 1993-1996 contains the language of a non-compulsory arbitration provision. Plaintiff argues that had she wished to file her grievance against Owens-Brockway in February, 1993, she could not because she had been led to believe —pursuant to American International Adjustment Company's notice and instructions to her—that she was no longer an employee of Owens-Brockway. Therefore, argues plaintiff, plaintiff could not have availed herself to the Union Shop Contract Grievance Procedure. Instead, plaintiff claims that she is governed by the 1989-1993 Union Shop Contract under which defendant was under an obligation—under the ADA as well as its own contract provision at Article 40 governing treatment of handicapped employees, to make reasonable accommodation to plaintiff by providing plaintiff with light employment. Plaintiff further contends that Owens-Brockways' 1993-1996 Union Shop Contract did not become effective until

April 1, 1993, "long after the discriminatory acts about which plaintiff now complains, had occurred."

The argument concerning the estoppel effect of the collective bargaining agreement's grievance procedures essentially turns on which CBA controls, either the 1989-93 Union Shop Contract or the 1993-1996 Contract. The alleged discrimination that plaintiff complains of occurred on June 1, 1993, which is the day that defendant terminated Austin's employment. On June 1, 1993, the April 1, 1993-March 31, 1996 Union Shop Contract was in effect. The April 1, 1993-March 31, 1996 contract governs this dispute and it provides specifically for grievance procedures (see Articles 31 and 38) to be utilized to resolve disputes under the ADA. Article 31 at page 68 of the Union Shop Contract states that "any disputes under this article . . . shall be subject to the grievance procedure." Because plaintiff's complaint was subject to mandatory arbitration, the *Gilmer* line of cases applies here. Accordingly, because plaintiff did not uilize the grievance procedures available in the April 1, 1993-March 31, 1996 Union Shop Contract, Summary Judgment will be granted in favor of defendant.

An appropriate Order will be entered.

Jackson L. Kiser, Chief United States District Judge

ORDER

For the reasons stated in the Memorandum Opinion accompanying this Order, it is hereby ORDERED and ADJUDGED that Defendant's Motion to Dismiss which was converted to a Rule 56 Motion for Summary Judgment is GRANTED.

The Clerk is directed to send a copy of this Order to all counsel of record and to strike this case from the active docket.

ENTERED this 14th day of January 1994.

Jackson L. Kiser

Chief United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1213, No. 94-1265

LINDA AUSTIN,
Plaintiff-Appellant,

v.

OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED,
Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amici Curiae.

LINDA AUSTIN,
Plaintiff-Appellee,

v.

OWENS-BROCKWAY GLASS CONTAINER, INCORPORATED,
Defendant-Appellant.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION;
EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amici Curiae.

Entered April 30, 1996

ORDER

Upon a request for a poll of the court on the petition for rehearing en banc, Judges Hall, Murnaghan, Michael,

and Motz voted in favor of hearing en banc, while Judges Wilkinson, Russell, Widener, Ervin, Wilkins, Niemeyer, Hamilton, Luttig, and Williams, voted against rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same is, denied.

With concurrence of Judge Chapman.

Judge Hall dissents. He would grant rehearing for the reasons set out in his dissenting opinion.

/s/ H. E. Widener, Jr.
For the Court

Supreme Court, U.S.
FILED
OCT 7 1996
CLERK

No. 96-337

In The Supreme Court Of The United States

October Term 1996

LINDA AUSTIN,

Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals properly enforce the arbitration clause in the collective bargaining agreement governing Petitioner's employment by requiring Petitioner to exhaust the grievance and arbitration procedure prior to bringing a claim in federal court?

2. Does this Court lack jurisdiction over Petitioner's claim because she failed to file a charge of discrimination with the Equal Employment Opportunity Commission prior to filing a claim in federal court?

PARTIES TO THE PROCEEDING

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Owens-Brockway Glass Container, Inc.,[1] Respondent
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[1]The parent corporation for this party is Owens-Illinois, Inc. This party has no affiliates or subsidiaries.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-337

LINDA AUSTIN,

Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Owens-Brockway Glass Container, Inc. respectfully contends that this Court should deny the petition for writ of certiorari which seeks review of the Fourth Circuit's decision in *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

OPINIONS BELOW

The decision of the Fourth Circuit is reported at 78 F.3d 875 (4th Cir. 1996). The decision of the United States District Court for the Western District of Virginia is reported at 844 F. Supp. 1103 (W.D.Va. 1994).

STATEMENT OF JURISDICTION

The Petition for Writ of Certiorari correctly sets forth the Petitioner's basis for invocation of this Court's jurisdiction. Additionally, Respondent maintains that the failure of Petitioner and her counsel to file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") as required by 42 U.S.C. § 2000e-5(b) (1989) and 42 U.S.C. § 12117(a) (1996 Supp.) deprives this Court of jurisdiction over Petitioner's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA").

STATUTORY PROVISIONS

The Petition for Writ of Certiorari correctly sets forth most of the statutory provisions relevant to this matter. The following additional statutory provisions are relevant and are reproduced verbatim in the Appendix pursuant to Sup. Ct. R. 14(f):

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b).

The Americans with Disabilities Act, 42 U.S.C. § 12117(a).

29 C.F.R. § 1601.8 (1993).

29 C.F.R. § 1601.9 (1993).

STATEMENT OF THE CASE

Statement of Facts

Petitioner has been employed by Respondent since 1978. In June of 1992, she allegedly sustained a work-related injury while working as an equipment cleaner/oiler greaser. Shortly thereafter, Respondent began paying her workers' compensation benefits and placed her on "Inactive-Occupational Medical Leave" status. Petitioner was never terminated by Respondent. As of the date that the District Court entered Summary Judgment in this case, Petitioner remained on inactive status with Respondent and continued to receive Virginia workers' compensation benefits. This fact is reflected by the presence of her name on the master list of employees in November 1993, the fact that the Union was never notified of her alleged termination, as would be required by the collective bargaining agreement, and the fact that she never received COBRA notification. J.A.[2] at 33-38.

Petitioner's employment is governed by a collective bargaining agreement ("Agreement") between Respondent and the Glass, Molders, Pottery, Plastics and Allied Workers International Union ("Union"). The Agreement contains a grievance-arbitration procedure which is applicable to "all disputes" arising between Petitioner and Respondent. The Agreement contains a broad non-discrimination clause which expressly incorporates the substantive and remedial provisions of the ADA and Title VII as terms of employment and specifies that any claims arising under those statutes are subject to the grievance/arbitration provisions of the

[2]All references to "J.A." refer to the Joint Appendix filed in the proceedings below with the Fourth Circuit.

Agreement. The non-discrimination provision includes the following:

> **Article 38: Fair Employment Practice and Equal Opportunities**
>
> 1. The Company and the Union will comply with all laws preventing discrimination against any employee because of . . . sex [or] handicap . . .
>
> 2. This Contract shall be administered in accordance with the applicable provisions of the Americans with Disabilities Act . . .
>
> 3. Any disputes under this Article as with all other Articles of this Contract shall be subject to the grievance procedure.

Respondent and the Union have incorporated further protections for handicapped employees as follows:

> **Article 40: Handicapped Employees**
>
> 1. An employee who is physically handicapped or infirmed by reason of occupational injury or illness and who is unable to work his regular job will be placed on any job acceptable to him which he is physically able to perform in line with his seniority and qualifications . . .
>
> 2. This Contract will also be administered **consistently with those applicable laws preventing discrimination** as to qualified handicapped individuals. (emphasis supplied).

Petitioner made no attempt to utilize the Agreement's grievance and arbitration provisions prior to filing her ADA and Title VII claims in federal court, despite her explicit contention as stated by her legal counsel that the ADA claim is based upon the Respondent's alleged breach of Article 40 of the Agreement. J.A. at 106-107.

Petitioner failed to file an EEOC Charge concerning her ADA and Title VII claims prior to filing this suit. Petitioner argued below that the charge-filing requirement should be entirely waived because an EEOC representative allegedly refused to accept a charge from Petitioner's legal counsel during a telephone conversation or send her an EEOC charge form.

Proceedings Below

Petitioner brought this action seeking relief for Respondent's alleged violations of the ADA and Title VII. Respondent moved to dismiss on the grounds that the distinct court lacked jurisdiction because Petitioner had not exhausted her contractual remedies under the collective bargaining agreement and because she had not filed a charge with the EEOC. The District Court treated the motion as one for Summary Judgment and dismissed the case because Petitioner had not exhausted the grievance and arbitration provisions of the Agreement, citing this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), to the effect that agreements to arbitrate statutory discrimination claims are enforceable. The Court rejected Respondent's argument with respect to non-compliance with the charge-filing issue because it found a factual dispute concerning various telephone conversations between Petitioner and her counsel and a representative of the EEOC.

The Fourth Circuit affirmed. The Court noted that this Court made clear in *Gilmer* that agreements to arbitrate discrimination claims should be enforced unless the text or legislative history of the statute, or an inherent conflict between arbitration and the statute's goals, demonstrates that Congress intended to preclude a waiver of judicial remedies. The Fourth Circuit found that the text of the ADA and the Civil Rights Act of 1991 demonstrated Congressional intent to *encourage* arbitration and that there was no conflict between arbitration and those statutes. The Court held that the arbitration clause in the Agreement should be enforced and that Petitioner had to attempt to utilize the arbitration machinery before she could sue.[3]

REASONS FOR DENYING THE PETITION

1. THE FOURTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Petitioner argues that the Fourth Circuit's decision should be reversed because it is contrary to *Alexander v. Gardner-Denver Corp.*, 415 U.S. 36 (1974), and its progeny, *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) and *McDonald v. City of West Branch*, 466 U.S. 284

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[3]Although Owens-Brockway argued that this result was justified under the FAA, the Court relied upon the analogous well-recognized federal policy favoring enforcement of arbitration clauses in collective bargaining agreements under the Labor Management Relations Act, 29 U.S.C. § 151 *et seq.* Fourth Circuit precedent holding that the FAA does not apply to employment contracts, the Court said, precluded it from applying the FAA to enforce the arbitration provision. The Court did not accept Respondent's suggestion that it should reverse such precedent and join the majority of other courts which have concluded that the FAA applies to contracts of employment.

(1984), and subsequent cases which have elaborated on *Gardner-Denver*'s "essential rationale," including *Livadas v. Bradshaw*, 512 U.S. 107 (1994), *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557 (1987), and *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985). The decision below is readily distinguishable from the line of cases relied upon by Petitioner and is fully consistent with this Court's decision in *Gilmer*, 500 U.S. 20 (1991) for three reasons. First, the *Gardner-Denver* line of cases concern the issue of preclusion, while *Gilmer* and this case concern the enforceability of an arbitration agreement. Second, the potential tension between statutory and collective rights anticipated in the *Gardner-Denver* line of cases does not exist in this case because Petitioner's statutory rights have been expressly incorporated into the Agreement and because Petitioner seeks to recover for a breach of the Agreement. Third, unlike the *Gardner-Denver* line of cases, an arbitrator in this case would be authorized and required to decide Petitioner's contractual and statutory claims, which are synonymous.

Petitioner ignores the critical distinction between this Court's preclusion and exhaustion jurisprudence. In *Gardner-Denver*, *Barrentine*, and *McDonald*, this Court determined only the extent to which employees who had already submitted their statutory discrimination claims to arbitration under a collective bargaining agreement were precluded from later bringing those claims in court. As this Court observed in *Gilmer*:

> those cases did not involve the issue of the enforcement of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims.

Gilmer, 500 U.S. at 35. Because those cases did not concern the enforceability of an arbitration agreement under the FAA, the Court continued, the "liberal federal policy favoring arbitration agreements" was not at issue. *Id.*

Because Petitioner has not yet attempted to utilize the grievance and arbitration procedures in the Agreement, this case, like *Gilmer*, involves the issue of the enforceability of an agreement to arbitrate statutory claims, not the preclusive effect of a prior arbitration award. This case, like *Gilmer* and unlike *Gardner-Denver*, implicates the "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 35 (*quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983); *see also Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448, 455 (1957) (LMRA embodies a strong federal policy favoring compulsory arbitration of disputes concerning application or interpretation of collective bargaining agreement). An integral part of this policy is the requirement that an employee exhaust grievance and arbitration procedures prior to initiating a lawsuit. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). As this Court noted with respect to employees seeking redress for violations of a collective bargaining agreement under the LMRA:[4]

> federal labor policy requires that individual employees wishing to assert contract grievances must ***attempt*** use of the contract grievance procedure agreed upon by employer and union . . . And it cannot be said, in the

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[4]It bears repeating in this context that Petitioner's counsel has conceded that her statutory claims are predicated upon Owens-Brockway's alleged failure to comply with the provisions of Article 40 of the collective bargaining agreement. J.A. at 106-07.

> normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee *until the* employee has attempted to implement the procedures and found them so.

Id. (emphasis in original).

Apparently Petitioner argues that there is an absolute tension between the rights guaranteed by the Agreement and non-discrimination statutes which compels the conclusion that *Gardner-Denver* controls this case.[5] Because this is an exhaustion, not preclusion, case, Petitioner's concern for a potential for conflicting rights is premature. Petitioner has never attempted to utilize the grievance and arbitration provisions of the Agreement. Given the explicit incorporation of statutory rights in this collective bargaining agreement, the presumption should be that the grievance and arbitration machinery will vindicate any rights Petitioner may have in law and contract.

Petitioner's erroneous perception of potential tension between collective and individual rights is the second basis for distinguishing this case from *Gardner-Denver* and its progeny. This Court has expressly stated that such tension does not exist "where a collective bargaining agreement

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[5]This Court previously rejected Petitioner's contention that *Gardner-Denver* dictates that a union cannot bind its members to an exhaustion requirement because it would constitute a "waiver" of their statutory rights when it held that, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

contains provisions facially similar to those of Title VII." *Gardner-Denver*, 415 U.S. at 57. Such is the case with Petitioner's Agreement, which expressly incorporates the substantive and remedial provisions of the ADA and Title VII as terms of employment. Unlike *Gardner-Denver* and its progeny, this case does not present different contractual and statutory rights, because in this collective bargaining agreement those rights are the same; i.e., the law of the land *is* the "law of the shop." The fact that Petitioner's ADA claim is predicated upon a breach of the *contractual* provisions contained in Articles 38 and 40 underscores this fact.

The third basis for distinguishing this case from *Gardner-Denver* concerns the arbitrability of Petitioner's claims under the Agreement. The Court in *Gilmer* distinguished *Gardner-Denver* on the ground that Gilmer's employment agreement contained an agreement to arbitrate statutory discrimination claims, while the collective bargaining agreement in *Gardner-Denver* contained no such provision. *Gilmer*, 500 U.S. at 35. As in *Gilmer*, but unlike *Gardner-Denver*, an arbitrator under this Agreement is authorized and obligated to hear and resolve claims of discrimination. *See Gilmer*, 500 U.S. at 35; *Gardner-Denver*, 415 U.S. at 53.

Moreover, as in *Gilmer* and unlike *Gardner-Denver*, arbitration of Petitioner's claims is governed by rules which provide procedural safeguards sufficient to ensure that her statutory rights are protected. Under Article 32, § 4 of the Agreement, Petitioner's claims are governed by the rules of the American Arbitration Association ("AAA"). The AAA rules offer the same protections as the NYSE rules which this Court deemed to be adequate to protect Gilmer's statutory rights. *Gilmer*, 500 U.S. at 30-32; American Arbitration

Association, Labor Arbitration Rules, September 1, 1993. Sections 12-14 of the Rules provide arbitrator appointment procedures designed to safeguard against biased arbitrators; § 28 provide for discovery and that formal evidentiary rules other than relevancy and materiality will not apply; and § 38 requires that awards be in writing. AAA Labor Arbitration Rules, pp. 8-9; 12; 14. Furthermore, because the collective bargaining agreement incorporates all of the provisions of Title VII and the ADA, an arbitrator presiding over Petitioner's claims would have authority to award any and all remedies available under either statute.

2. THE DECISION BELOW IS NOT IN CONFLICT WITH A DECISION OF ANOTHER FEDERAL APPELLATE COURT OR WITH A DECISION OF A STATE COURT OF LAST RESORT.

Petitioner argues that the Fourth Circuit's decision is in conflict with decisions of the Second, Seventh, and Tenth Circuits, as well as a decision of the Maine Supreme Court.[6] Review of the decisions relied upon by Petitioner, however, reveals that each is distinguishable from the Fourth Circuit's decision herein and does not provide a basis for the grant of certiorari.

Two of the decisions cited by Petitioner are distinguishable because they are preclusion, not exhaustion cases. In *Ryan v. City of Shawnee*, 13 F.3d 345, 346 (10th

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[6]Petitioner also relies on *Kirkwood v. Courier-Journal*, 858 S.W.2d 194 (Ky. App. 1993) in support of her petition for certiorari. Because this decision was not rendered by a state court of last resort, it does not support the petition. Sup. Ct. R. 10(a).

Cir. 1993), and *Winston v. Maine Technical College System*, 631 A.2d 70, 73 (Me. 1993), *cert. denied*, 114 S.Ct. 1643 (1994), the employees had already completed arbitration proceedings pursuant to their collective bargaining agreements, and the courts were concerned only with the preclusive effect of the arbitration award. These two cases, like *Gardner-Denver* and its progeny, do not implicate the "liberal federal policy favoring arbitration" under the FAA and LMRA. *Gilmer*, 500 U.S. at 35 (arbitration of disputes under FAA); *Lincoln Mills*, 353 U.S. at 455 (arbitration of disputes concerning collective bargaining agreements under LMRA). Because Petitioner has yet to utilize the grievance-arbitration machinery in the Agreement, this case, like *Gilmer*, concerns the enforceability of an agreement to arbitrate.

The Seventh Circuit's decision in *E.E.O.C. v. Board of Governors*, 957 F.2d 424 (7th Cir.), *cert. denied*, 506 U.S. 906 (1992), presents a completely different factual scenario than this case. That case involved a collective bargaining agreement which specifically ***denied*** employees the right to utilize the agreement's grievance and arbitration proceedings if they initiated administrative or judicial proceedings. *Id.* at 426. The EEOC brought suit to have the policy declared to be in violation of the Age Discrimination in Employment Act. The Seventh Circuit held that the policy violated the ADEA's prohibition against penalizing employees who exercise their ADEA rights, holding that "a collective bargaining agreement may not provide that grievances will proceed to arbitration only if the employee refrains from participating in protected activity under the ADEA." *Id.* at 431. In addition to presenting a completely different factual scenario, the Seventh Circuit's decision truly involved a "waiver" of the employees' rights. In this case, there has been no "waiver" of Petitioner's statutory rights. Rather than removing a forum, the

Agreement specifically provides an initial forum for the resolution of Petitioner's statutory claims.

The Second Circuit's decision in *Tran v. Tran*, 54 F.3d 115 (2nd Cir. 1995), *cert. denied*, 116 S.Ct. 1417 (1996), is also distinguishable from the case at bar. As the Fourth Circuit noted, *Tran* involved claims arising under the Fair Labor Standards Act ("FLSA"), which, unlike Title VII or the ADA, contains no provision expressly endorsing arbitration. *Austin*, 78 F.3d at 882, n.2. While the Second Circuit's decision in *Tran* shares more factual similarities to this case than the other decisions relied upon by Petitioner, Respondent suggests that this critical distinction prevents those similarities from giving rise to a split between the Second and Fourth Circuits.[7]

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[7]Should the Court find *Austin* and *Tran* to be in conflict, Respondent respectfully suggests that, given the large number of cases which are factually and legally analogous to this case which are developing at the district court level, *see, e.g.*, *Pryner v. Tractor Supply Co.*, No. 95-C-211, Order of July 31, 1996 (7th Cir. 1996) (staying trial court proceedings pending employer's appeal of district court's denial of motion to compel arbitration under collective bargaining agreement); *Jessie v. Carter Health Care Ctr., Inc.*, 930 F. Supp. 1174 (E.D.Ky. 1996) (compelling arbitration under collective bargaining agreement); *Knox v. Wheeling-Pittsburgh Steel Corp.*, 899 F. Supp. 1529 (N.D.W.Va. 1995) (same); *Randolph v. Cooper Industries*, 879 F. Supp. 518 (W.D.Pa. 1994) (declining to compel arbitration under collective bargaining agreement); *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802 (C.D.Ill. 1994) (same); *Lagrone v. Tomasso*, 1992 U.S.Dist. LEXIS 21958 (D.Conn. 1993) (compelling arbitration), denial of certiorari in this case would allow the Court the benefit of a thorough exploration of these issues by other Circuits.

3. REQUIRING EXHAUSTION IS THE BEST WAY TO RECONCILE THE FEDERAL POLICY FAVORING ARBITRATION WITH PETITIONER'S STATUTORY RIGHTS.

Requiring Petitioner to submit her ADA and Title VII claims to grievance and arbitration prior to bringing suit in federal court is fully consistent with the statutory emphasis on voluntary compliance and resolution of workplace disputes short of recourse to the courts. This Court has long recognized the Congressional intent to promote voluntary compliance in resolving disputes arising under employment discrimination statutes. *See Gardner-Denver*, 415 U.S. at 44 (Congress selected cooperation and voluntary compliance as the preferred means for eliminating workplace discrimination). As the Court noted in *Gardner-Denver* with respect to compulsory arbitration under the LMRA, requiring arbitration before recourse to other judicial mechanisms has the advantage of permitting a dispute to be resolved to the parties' satisfaction, thus obviating the need for further legal action:

> By allowing the dispute to go to arbitration . . . those conciliatory measures which Congress deemed vital to 'industrial peace' . . . and which may be dispositive of the entire dispute, are encouraged.

Gardner-Denver, 415 U.S. at 50, n. 13. The Court elaborated further upon the ability of compulsory arbitration to facilitate the conciliatory process deemed vital to the statutory scheme of laws prohibiting employment discrimination:

> the grievance-arbitration machinery of the collective bargaining agreement remains a

> relatively inexpensive and expeditious means for resolving a wide range of disputes, ***including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee.*** An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration ***which may satisfy an employee's perceived need to resort to the judicial forum*** . . . For similar reasons, the employee also has a strong incentive to arbitrate grievances, and ***arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.***

Id. at 55 (emphasis supplied).

Lower courts attempting to reconcile *Gilmer* and *Gardner-Denver* have found that requiring exhaustion of arbitral remedies prior to legal action permits courts to give effect to the federal policy favoring arbitration while taking into consideration the concerns of statutory and collective rights expressed in *Gardner-Denver*. *See, e.g., Knox*, 899 F. Supp. at 1539 (requiring arbitration prior to court action effectuates Congress' intent to have Title VII supplement rather than supplant other remedies for employment discrimination "by allowing Title VII to co-exist with, rather than displacing, the policy encouraging mandatory arbitration of employment disputes under collective bargaining

agreements"); *Adams v. Burlington Northern R.R. Co.*, 843 F. Supp. 686, 691 (D. Kan. 1994) (interpreting *Gardner-Denver* as signifying that arbitration required under collective bargaining agreement should not be the ***sole*** remedy for statutory discrimination claims).

The efficacy of a policy which vindicates Petitioner's statutory rights with the federal policy favoring arbitration is apparent in the context of her ADA claim. Petitioner's rights under the ADA are not absolute; they are defined by, and subject to, the rights of other employees in her workplace. *See, e.g., Eckles v. Consolidated Rail Corp.*, 1996 U.S. App. LEXIS 20403, *30 (7th Cir. 1996) (ADA's requirement of reasonable accommodation does not require employees to be accommodated by sacrificing seniority rights of other employees under collective bargaining agreement); *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995) (handicapped employees' right to reasonable accommodation does not require employer action inconsistent with contractual rights of other employees under collective bargaining agreement); *c.f. Trans World Airlines v. Hardison*, 432 U.S. 63, 79 (1977) (right to reasonable accommodation of religious practices under Title VII does not supersede collectively-bargained seniority rights of other employees). Congress was clearly aware when it enacted the ADA of the potential for conflict between the obligations imposed on employers by the ADA and the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* (1988) ("NLRA").[8] S.Rep. No. 116, 101st Cong.,

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[8]For example, an employer who unilaterally implements an ADA accommodation requested by an employee is vulnerable to an Unfair Labor Practice charge by the union under § 8(a)(5) of the NLRA. Indeed, simply consulting directly with the disabled employee could violate the NLRA's prohibition against employers dealing directly with bargaining-unit employees. The same would be true of an accommodation requested

1st Sess. 2, 32 (1989); H.R.Rep. No. 485, 101st Cong., 2nd Sess., pt. 2 at 63 (1990), *reprinted in* 1990 U.S.C.C.A.N. 304, 346. Congress' suggestion for avoiding such conflicts was for employers and unions to include provisions in the collective bargaining agreements permitting the employer to take all actions necessary to comply with the ADA. *Ibid.*

This is exactly what Petitioner and the Union did in their collective bargaining agreement. The Agreement at Articles 38 and 40 contains provisions expressly incorporating Respondent's duty to accommodate disabled employees. Petitioner's ADA claim is based on Respondent's alleged violation of Articles 38 and 40. The arbitrator's expertise at balancing collective and individual rights where an employee asserts a violation of a collective bargaining agreement is clearly and peculiarly appropriate in this context. Who better to determine whether, as Petitioner claims, Respondent's conduct violated Articles 38 and 40 of the Agreement than an arbitrator? *See United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960) (questions concerning interpretation of contract and merits of grievance are for arbitrator, not courts). If the Court refuses to compel Petitioner to attempt to utilize her contractual remedies to resolve her contractual and statutory claims prior to filing suit, Respondent, the Union, and Petitioner are deprived of a primary means of resolving Petitioner's workplace-based claims.

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by an employee based on religion, sex, race, or age.

4. PETITIONER'S FAILURE TO FILE AN EEOC CHARGE DEPRIVES THIS COURT OF JURISDICTION OVER HER CLAIMS.

Before filing a civil suit for a violation of Title VII, an aggrieved party must file a Charge with the EEOC. 42 U.S.C. § 2000e-5(b). The procedures of § 2000e-5(b) are applicable to a proceeding under the ADA. 42 U.S.C. § 12117(a). This Court has noted that the filing requirement is a jurisdictional prerequisite to a suit under Title VII. *See Gardner-Denver*, 415 U.S. at 47. While the Court later elaborated that the ***time limits*** for a charge ***filed late*** were not jurisdictional, but rather were requirements similar to statutes of limitations subject to waiver, estoppel, and equitable tolling, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392 (1982), it has never held that a plaintiff may completely ignore the charge-filing requirement.

Even after this Court's decision in *Zipes*, most lower courts have continued to hold that the charge-filing requirement, as opposed to the mere requirement of a *timely* filing, is a jurisdictional prerequisite to maintenance of a Title VII suit. *See, e.g., Jones v. Runyon*, 91 F.3d 1398, 1399-1400, n.1 (10th Cir. 1996); *Davis v. N.C. Dept. of Correction*, 48 F.3d 134, 137 (4th Cir. 1995); *Nat'l Assn. of Governmental Emp. v. City Public Service*, 40 F.3d 698, 711 (5th Cir. 1994); *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891, 899 (9th Cir. 1994); *Butts v. City of New York Dept. of Housing*, 990 F.2d 1397, 1401 (2nd Cir. 1993); *Trevino-Barton v. Pittsburgh Nat. Bank*, 919 F.2d 874, 878 (3rd Cir. 1990). There is a statutory and rational basis for distinguishing the charge-filing requirement from the timeliness issue addressed in *Zipes*. The charge-filing requirement serves two important policy concerns which are not implicated by the timeliness requirement: 1) notice to the

charged party of an alleged violation; and 2) securing voluntary compliance with the law through conciliation, the primary goal of the EEOC. *Alvarado v. Board of Trustees*, 848 F.2d 457, 458-59 (4th Cir. 1988); *see also Butts*, 990 F.2d at 1401 (permitting plaintiff to litigate claim not first presented to EEOC would defeat purpose of notice provision -- encouragement of claim resolution through conciliation and voluntary compliance).

Because the charge-filing requirement is jurisdictional, and thus is not subject to equitable tolling or modification, the factual discrepancies which the district court found concerning the telephone discussions between Petitioner's counsel and an EEOC representative are legally insufficient to defeat summary judgment because none of the disputed facts were material to this issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Moreover, even if this Court were to determine that the charge-filing requirement is a procedural and not jurisdictional prerequisite, Respondent would be entitled to summary judgment because Petitioner's version of the actions she and her counsel took at the EEOC do not justify an equitable exception to the charge-filing requirement as a matter of law. Petitioner's evidence was that she attempted to file a charge over the telephone with an EEOC representative, who "refused to accept her complaint" or to send her a charge form. J.A. at 22. A few days later, Petitioner's counsel contacted the same EEOC representative via telephone and requested that Petitioner's claims be accepted over the phone. J.A. at 23. According to Petitioner's counsel, the representative refused to accept the charge, and "asserted [the EEOC's] authority to administratively reject any complaint in this manner." *Id.*

Despite the fact that Petitioner's counsel knew that the EEOC representative had no authority to "administratively reject" a charge, J.A. at 103, counsel decided not to send any writing to the EEOC on the basis of her belief that the EEOC would not have accepted the charge unless it was submitted to the EEOC regional office on an official EEOC charge form. J.A. at 98-99; 101. Petitioner's counsel made clear to the district court that she was not seeking equitable tolling of the time limits for filing a charge, but a *complete waiver* of the filing requirement. J.A. at 103.

This Court has recognized in the context of equitable tolling of the time limits for filing a charge that such relief is reserved only for the most deserving plaintiffs:

> federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Veterans Administration, 498 U.S. 89, 96 (1990). Petitioner was represented by counsel at all times relevant to

the dispute, and her counsel failed to exercise due diligence in preserving Petitioner's rights.[9]

Although Petitioner's counsel knew that the EEOC had no authority to administratively reject a charge over the telephone, counsel took no further action when the representative refused to accept the charge over the phone or send her a charge form. The EEOC regulations do not provide for Title VII or ADA charges to be accepted over the telephone. 29 C.F.R. § 1601.9 (1993). The regulations do not require that a charge be submitted on an EEOC form, only that they be submitted in writing and be signed and verified. *Id.* The regulations do not require that a charge be submitted to the EEOC regional office. Rather, they provide that a charge "may be made in person or by mail at the offices of the Commission in Washington, D.C., or any other of its field offices," the addresses of which are also provided in the regulations. 29 C.F.R. §§ 1601.8 (1993).

Petitioner's counsel, and therefore Petitioner, is chargeable with knowledge of the regulations concerning the means for filing a charge under the ADA and Title VII. *See Irwin*, 498 U.S. at 92-93 (party represented by counsel before EEOC is bound by counsel's actions and is noticed with all information with which counsel can be charged). The undisputed evidence surrounding the failure of Petitioner's counsel to properly *attempt* to file a charge is insufficient as

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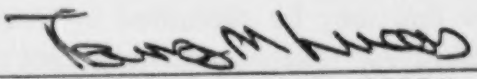
[9]The lack of diligence of Petitioner's counsel is also demonstrated by the fact that counsel *still* failed to file a written charge with the EEOC to protect Petitioner's rights after Owens-Brockway moved to dismiss on this ground, despite the fact that at that time almost one month remained before the expiration of the 180-day time limit for filing a charge.

a matter of law to warrant equitable relief from the charge-filing requirement.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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APPENDIX

APPENDIX

STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(b) (1989):

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

The Americans with Disabilities Act, 42 U.S.C. § 12117(a) (1996 Supp.):

> The powers, remedies and procedures set forth in sections . . . 706 . . . of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) shall be the powers, remedies, and procedures this title provides to the Commission . . . or to any person alleging discrimination on the basis of disability in violation of this Act . .

The Federal Arbitration Act, 9 U.S.C. § 2 (1987):

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Federal Arbitration Act, 9 U.S.C. § 4 (1987):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 [28 U.S.C. §§ 1 *et seq.*], in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement . . .

29 C.F.R. § 1601.8 (1993):

> A charge may be made in person or by mail at the offices of the Commission in Washington, D.C., or any of its field offices or with any designated representative of the Commission. The addresses of the Commission's field offices appear in § 1610.4.

29 C.F.R. § 1601.9 (1993):

> A charge shall be in writing and signed and shall be verified.

Supreme Court, U.S.
F I L E D
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CLERK

No. 96-337

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

LINDA AUSTIN,
Petitioner,

v.

OWENS-BROCKWAY GLASS CONTAINER, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY BRIEF

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STATUTES:

Federal Arbitration Act, 9 U.S.C. § 10 4

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1. Since the *certiorari* petition was filed, the conflict in the circuits over the vitality—and the scope—of the *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) rule, outlined at Pet. 17-20, has deepened.

The Eighth Circuit, in *Varner v. National Super Markets, Inc.*, 94 F.3d 1209 (8th Cir. 1996), held that a Title VII plaintiff need not exhaust grievance and arbitration remedies under the collective bargaining agreement:

> [T]he United States Supreme Court has held that the pursuit of a claim through grievance and binding arbitration under a CBA does not preclude a

> civil suit under Title VII, *see Alexander* . . . and we believe the same reasoning applies to a plaintiff who has chosen not to participate in the grievance procedure. . . . We interpret [*Alexander*] . . . to entail an absolute right to adjudicate suits under Title VII as long as the jurisdictional prerequisites are satisfied. These prerequisites do not entail an exhaustion of grievance procedures under a CBA. *See*, 42 U.S.C. § 2000e-5(b), (e) and (f). [94 F. 3d at 1213.]

Like *Varner*, this case involves a sex discrimination claim under Title VII. And, both *Varner* and this case concern the question whether a plaintiff in such a case can be required to exhaust collective bargaining agreement grievance-arbitration procedures, not whether a plaintiff who has done so is bound by the result obtained in arbitration.

Thus, this case and *Varner* are indistinguishable on the various grounds on which respondent attempts to distinguish the other circuit and state high court cases conceptually in conflict with the Fourth Circuit's decision in this case. Respondent's Brief in Opposition to Petition for Writ of Certiorari (Br. Opp.) , at 11-13.

We do not for a moment agree with respondent's distinctions of those other cases. But, for present purposes the salient point is that none of those distinctions apply to *Varner*. Thus, there is now, even on respondent's analysis, no basis at all for delaying plenary review in this Court of the important question raised in the *certiorari* petition.

2. In addition to denying the existence of a circuit conflict, Owens-Brockway's primary response to the *certiorari* petition is to seek to minimize the Fourth Circuit's holding in this case by suggesting that under that holding Ms. Austin would have been entirely free to bring her Title VII and Americans With Disabilities Act case in court had she only first filed a grievance under the collec-

tive bargaining agreement. That is not what the Fourth Circuit held. And if it were, that holding would, as *Varner* indicates, create a second square circuit conflict in addition to the one we noted in the petition, concerning whether the *Alexander v. Gardner-Denver Corp.*, rule applies in the exhaustion, as well as the preclusion, context.

(i) Nothing in the Fourth Circuit's opinion in this case draws the distinction between initial exhaustion of arbitral remedies and later, post-arbitration preclusion of judicial remedies on which the opposition brief rests. Rather, both the Fourth Circuit's own language and the two lines of cases on which the court of appeals relied make clear that any requirement of exhaustion of the arbitral forum necessarily means that the employee would be bound by the grievance/arbitration results, absent proof of narrowly-defined extenuating circumstances justifying vacation of the arbitration award.

Like most such provisions, the grievance/arbitration procedure in the applicable collective bargaining agreement does not contemplate free post-arbitration access to the courts to relitigate the same issues required to be presented to the arbitrator. Rather, that clause provides that the arbitrator's decision "shall be final and binding". Pet. App. 7a. The court of appeals held the arbitration clause, including its "final and binding" provision, equally applicable to statutory, and to contract-based, causes of action. As that court recognized, the effect of doing so is to "*effectively oust*[] a court of jurisdiction" over the individual employee-protective statutory cause of action (Pet. App. 3a n.1, emphasis supplied), and to require that the plaintiff submit to resolution of his or her substantive statutory rights " 'in an arbitral *rather than* a judicial forum,' " (Pet. App. 8a, emphasis supplied, *quoting Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

And, *Gilmer*, the linchpin of the Fourth Circuit's decision, held squarely that enforcing a promise to arbitrate

works a "waiver of a judicial forum" (500 U.S. at 26), not simply a temporary delay of judicial resolution. Thus *Gilmer* held, and the court below understood it to hold, that where arbitration is compulsory, an employee is precluded from litigating her case in court *after*, as well as before, the issuance of the arbitration award.

Cases such as *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), as well as *Gilmer* itself, hold that where an individual agrees to submit a statutory claim to arbitration, and no exception to the coverage of the Federal Arbitration Act (FAA) applies, the FAA as a whole governs, and the dispute is therefore arbitrable. And, the FAA does not simply provide for initial exhaustion of arbitrable remedies; it provides thereafter, and inseparably, for enforcement of any resulting arbitration order, absent proof in court of the narrow grounds on which an arbitration award can be vacated—*viz.*, arbitrator corruption or partiality, procedural misconduct by the arbitrator, or "[w]here the arbitrators exceed their powers." 9 U.S.C. § 10 (a), (b) (c) & (d).

Similarly, the *Steelworkers Trilogy*, "establish[ing] that arbitration is favored in labor disputes" (Pet. App. 6a), makes clear that the policy favoring arbitration of labor disputes, where applicable, encompasses not simply an exhaustion requirement but an extremely narrow role for judicial review once the arbitration award has issued. Thus, on questions concerning the interpretation of collective bargaining agreements,

> the Court made clear almost 30 years ago that the courts play only a limited role when asked to review the decision of an arbitrator. The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract. "The refusal of courts to review the

> merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. . . ." [*Paperworkers v. Misco*, 484 U.S. 29, 36 ((1987), *quoting Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960)).]

If, in fact, petitioner is required to arbitrate both her Title VII and Americans with Disabilities Act causes of action, then, she will not thereafter be able to litigate her case fully in court, with a jury determination of the facts and a judicial determination of the law, respondent's repeated intimations to the contrary notwithstanding. The exhaustion and preclusion issues are, in other words, of a piece in the arbitration area, as the Fourth Circuit understood.

(ii) Respondent's related argument that the *Alexander v. Gardner-Davis* rule has application only after arbitration has occurred, not before, is trebly flawed.

First, *Alexander* holds, as an integral part of its ultimate conclusion that the plaintiff was not precluded from proceeding in court, that a collective bargaining agreement cannot work *any* prospective waiver of an employee's rights to full judicial relief for individual employment discrimination claims. Pet. 10-11, *quoting* 415 U.S. at 51. Only *after* so concluding did the *Alexander* Court go on to consider whether "[t]he actual submission of petitioner's grievance to arbitration . . . alter[s] the situation" (415 U.S. at 52), deciding that there could be no preclusion simply because the employee used the grievance/arbitration machinery once the dispute arose.

Second, soon after *Alexander*, this Court held in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976), relying on *Alexander*, that Title VII's timely-filing requirement should not be tolled while an employee pursues grievance/arbitration procedures under a collective bargaining agreement. That ruling necessarily rests on an understanding that the employee need not pursue

those procedures at all, but instead can proceed directly to court.

Finally, *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), expressly rejected the contention that employees covered by a collective bargaining agreement, even a collective agreement that permits arbitration of statutory issues, need resort to the collective agreement's grievance/arbitration procedures in the first instance. Pet. at 12 n.4. *Barrentine* took note of the facts (1) that the agreement in question would have permitted arbitration of the stautory issue involved in that case (the Fair Labor Standards Act issue) (450 U.S. at 731 n.5), and (2) that four of the plaintiffs had not pursued their contractual remedies, but emphasized that "our holding *does not depend on whether petitioners formally filed grievances*," (450 U.S. at 731 n.6 (emphasis added)).

(iii) Indeed, if respondents were right that the Fourth Circuit simply understood *Alexander* as a case limited to the preclusion context, there would be all the more reason to grant *certiorari* here. As *Varner* indicates, other courts of appeals have not so understood *Alexander*, but instead have regarded that case as equally applicable to the questions of whether collective bargaining agreement arbitration should be required in the first instance and whether a collective bargaining agreement arbitration, once completed, should be preclusive of plenary federal court litigation. *Varner, supra; Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1316 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Gibson v. Local 40, Supercargoes & Checkers*, 543 F.2d 1259, 1266 (9th Cir. 1976); *Romero v. Union Pac. R.R.*, 615 F.2d 1303, 1310 (10th Cir. 1980). Thus, if the Fourth Circuit indeed held, as respondent maintains, that *Alexander* has no application to the exhaustion question and never had, then the decision below is in conflict on that ground with the decisions of the Seventh, Eighth, Ninth, and Tenth Circuits.

3. Owen-Brockway's final argument against granting *certiorari* is that Ms. Austin's failure to file a written EEOC charge deprives this Court of jurisdiction over the question that the Fourth Circuit did decide. Br. Opp. 18. There is no reason, however, why this Court could not—or should not—decide the arbitration question and, if it reverses the Fourth Circuit on that question, remand for further proceedings, including proceedings to decide the charge-filing issue.

As the district court held (Pet. App. 30a-31a), there is a conflict in the evidence concerning Ms. Austin's attempts to file a charge with the EEOC. Ms. Austin's evidentiary submissions showed that she and her attorney both were told by the EEOC, on the telephone, that the agency would not accept her charges or send her a form for filing a charge; the employer submitted evidence disputing Ms. Austin's declaration and that of her attorney. *See also* Br. Opp. 19. The district court concluded that because "[t]here is a significant dispute as to precisely what actions Plaintiff took in bringing her complaint to the attention of the EEOC . . . summary judgment disposition on the issue of plaintiff's noncompliance . . . is inappropriate." Pet. App. 31a.

The Fourth Circuit, in turn, declined to decide, as respondent asked it to do, whether the failure to file a written charge with the EEOC is jurisdictional even if Ms. Austin's contention that she tried but was unable to file such a charge is accepted:

> Since a valid agreement to arbitrate future disputes effectively ousts a court of jurisdiction . . . each of the two defenses asserted here is essentially a plea to the jurisdiction. We need only decide one of them and decide the failure to submit the claim to the grievance-arbitration procedure. . . . We express no opinion on the [charge-filing] question. [Pet. App. 2a n.1.]

The Fourth Circuit was surely correct in its conclusion that, where two *jurisdiction-related* issues are raised, a court necessarily has jurisdiction to decide *either one* of those questions first. This Court could therefore, if review were granted, proceed in the same manner and, if it disagrees with the Fourth Circuit on the arbitration issue, reverse on that ground and permit the Fourth Circuit to reach and decide the second jurisdictional issue. Any other course would insulate the Fourth Circuit's decision from review because of an undecided jurisdictional question while leaving the opinion fully operative as a precedent for all future cases arising in the Fourth Circuit.[1]

CONCLUSION

For the reasons stated above and in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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[1] We note additionally, if more be necessary, that none of the cases respondent cites on the charge-filing question holds that an individual who *does* make an attempt to file a written EEOC charge but is precluded by the agency from doing so has not sufficiently met her charge-filing requirement for jurisdictional purposes. Thus, respondent's charge-filing objection is more properly regarded as procedural, not jurisdictional, and, like any other potentially dispositive question left undecided by a court of appeals, as an undecided question that does not preclude plenary review of the question that was decided.